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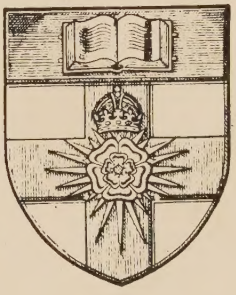

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THE

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INCLUDING

Bankruptcy and Lunacy Cases,

BEFORE

THE LORD CHANCELLOR,

AND THE

COURT OF APPEAL IN CHANCERY.

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ORDER OF COURT.

17*th April*, 1867. 1867

THE RIGHT HONOURABLE FREDERIC BARON CHELMSFORD, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Honourable the Vice-Chancellor SIR JOHN STUART, The Honourable the Vice-Chancellor SIR WILLIAM PAGE WOOD, and The Honourable the Vice-Chancellor SIR RICHARD MALINS: doth hereby, in pursuance of the Statutes 15th and 16th Victoria, chapters 80 and 86, and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following:

1. All applications made under the Statute 6th and 7th Victoria, chapter 73, to refer any bill of any Attorney or Solicitor of his fees, charges, and disbursements, for any business done by such Attorney or Solicitor, to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, or for any or either of those purposes, shall hereafter be made to a Judge at Chambers by Summons, instead of by special Petition to the Court, except applications for orders of course, which are to be made as heretofore.

2. The Rules numbered respectively 35 and 36 of the 40th of the Consolidated General Orders of the Court of Chancery are hereby abrogated.

3. Any party who may be dissatisfied with the certificate of the Taxing Master, as to any item, or part of an item, which may have been objected to, as in the 33rd Rule of such 40th Order mentioned, may apply to the Judge by whom the order for taxation shall have been made for an order to review the taxation, as to the same item or part of an item; and such application shall be made by a summons at Chambers, and such Judge may thereupon make such

This order is a consolidation of the order of 2 Aug 1861 when was intended appear, invalid because only signed by two of the Judges in addition to the Lord Chancellor see Short's Robert 2 Ch R. 12 Jur N.S. 77

See next page

1867 order as to the Judge shall seem just. But the certificate of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

4. Such application shall be heard and determined upon the evidence which shall have been brought in before the Taxing Master; and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct.

CHELMSFORD, C.
JOHN STUART, V.C.
W. P. WOOD, V.C.
RICHARD MALINS, V.C.

Appeal by Summons improper when bills had been filed 10 years ago. Re Woodard 17 Beav 166 [illegible]

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Chancery Appeal Cases

(*Including Bankruptcy and Lunacy Cases*)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

THOMAS *v.* DAW.

L. C.
1866
Nov. 7, 8.

Company—Commissioners of Sewers—Taking Land—57 Geo. 3, c. xxix.

The Commissioners of Sewers, acting under the powers of 57 Geo. 3, c. xxix. cannot take compulsorily the whole of a house unless they have formally adjudged that possession of the whole is necessary for the purpose of executing their powers.

THIS was an appeal from an order of Vice-Chancellor *Kindersley*, granting an injunction to restrain the Commissioners of Sewers from taking the whole of a house in *Threadneedle Street*.

The Plaintiffs were lessees of No. 49 and No. 50, *Threadneedle Street*, which their firm had occupied for seventy years as stock-brokers. In 1864 they pulled down No. 49, and intended to pull down No. 50, in order to build new offices on the site. The Commissioners of Sewers, acting under 57 Geo. 3, c. xxix., wished to widen the street, and for that purpose to take about seven feet in depth of the frontage of the two houses, and, after some discussion and changes of intention on their part, on the 4th of August, 1865, they served the Plaintiffs with notice to treat for the purchase of the site of No. 49. The Plaintiffs thereupon sent in a claim for £6000 for the site of No. 49. On the 26th of October the commissioners served the Plaintiffs with notice to treat as to No. 50,

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whereupon the Plaintiffs filed a bill to restrain the commissioners from proceeding to take either house, as they did not require the whole of the land, and only intended to take the seven feet and to sell the rest. The motion for an injunction being turned into a motion for a decree, the Vice-Chancellor *Kindersley* granted an injunction as to No. 50, but refused it as to No. 49 (1).

(1) The judgment of the Vice-Chancellor (January 16) was to the following effect:—

"There could be no doubt that the commissioners had a right to take so much of the houses as was necessary to widen the street, and it was admitted that all that was wanted to be thrown into the street was about seven feet; but the Plaintiffs said that the commissioners had no right to take more than they really required for the purpose of widening the street; and, on the other hand, the commissioners insisted that, by the powers of their Act, they could take the whole of the premises, and having taken the whole, and appropriated the strip of seven feet, could sell the rest; it being made no secret, but avowed in substance, that by selling the rest they intended to some extent to recoup themselves, so that no more money than was absolutely necessary might be required of the ratepayers.

"The question turned on the construction of the 80th, 82nd, and 96th sections of the Act, and chiefly on the 80th. It was contended by the Defendants that if there was a house, one corner of which projected into the street, the commissioners could take the whole; and when there was land, and no house, if the seven feet were required, the commissioners were authorized to take the whole, even if it were an acre, appropriating the seven feet to widen the street, and selling the rest, like a person making a bargain to put money into his pocket. It was true that if the commissioners did take the whole of a house, or piece of land, the 96th section authorized them to sell, and gave a right of pre-emption to the person from whom it was taken, very much as in the *Lands Clauses Act* and the special railway Acts; but the commissioners were not required to sell for five years at least, so that they might hold the surplus land for some time, and it would certainly not be for the advantage of the owner to purchase back at any future indefinite period, when, perhaps, after all, it might not be wanted. Therefore, substantially, the right of pre-emption would amount to very little in value. Was the Court therefore to put the construction on the 80th section that the commissioners, knowing that they wanted the seven feet strip and no more, were entitled to take the whole in order to make a good bargain, thinking it to be the interest of the ratepayers, and having no personal interest. From the clumsiness of the wording of the 80th section, there was some justification for their contention; but the necessity for the property being required for the purpose of widening expressed the intention of the Legislature, and governed the whole construction of the 80th section. Where a house projects into a street which is to be widened, the Legislature seemed to consider it to be for the interest of the public that the whole should be taken; but as to a piece of land, could that have been the intention? Suppose a man to own an acre of land in the outskirts of *London*, and that it was

The commissioners appealed.

Mr. *Baily*, Q.C., and Mr. *Pontifex*, for the Appellants, contended that, on the construction of the statute, they were entitled to take the land, and referred to section 80, which enacts, "That for the improvement of the streets and public places in the parochial or other districts within the jurisdiction of this Act, and for the public advantage, it shall and may be lawful to and for the commissioners, or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time, and at all times hereafter, to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen, and continue, or open the

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desirable to widen the adjoining road by seven feet, it could not be said that the commissioners, for the benefit of the ratepayers, would have a right to take the whole piece of land, and destroy the man's business, not to widen the street, but to ease the pecuniary burden of the ratepayers. It had been justly said that there was no distinction between houses, walls, buildings, lands, &c., and no doubt they are all jumbled together; but justice required that a reasonable construction should be put upon the words with respect to pieces of land which the commissioners could take possession of.

"It was further contended that the commissioners did not stand in the position of a railway company, and should be dealt with in a different manner. No doubt a railway company had not so large a discretion, and the Court dealt with it with more strictness because it had its own particular benefit at heart; but that extra discretion only went to the extent of the improvement, and not generally, but was limited to the altering, widening, and the like.

"Therefore, apart from anything specially applicable to these houses, the commissioners would have no right to take all this land, assuming there was no house on it, as was the case with No. 49. At the time of the notice, it was true, No. 50 was not pulled down, but it was intended to be pulled down, and must for the purposes of this motion be considered as a house actually pulled down. With respect to No. 49, the Plaintiffs had precluded themselves from complaining, by reason that, when they received the notice to treat, instead of insisting that the commissioners ought to content themselves with taking the seven feet, they sent in a claim, thereby recognising their right to take No. 49. The Plaintiffs said that they did not thereby recognise the right, because the notice to treat being merely formal, the claim was equally so; but it was admitted that the commissioners had a right to take, or, at all events, that the Plaintiffs were willing that they should take the whole. As to No. 49, therefore, the bill must be dismissed; but as to No. 50, the Plaintiffs would be entitled to a perpetual injunction. No costs, as the Plaintiffs had been wrong as to one part, and the Defendants as to the other part."

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same from the sides or ends of any streets or public places within any parochial or other district, into any other street or public place within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel, or pave, such new part or parts of any such streets or public places, so altered, widened, extended, opened, or lengthened, as aforesaid; and that if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof, *shall be adjudged by the said commissioners or trustees, or other persons, as aforesaid*, to project into, obstruct, or prevent them from so altering, turning, widening, extending, lengthening, continuing, or opening the said streets or public places, within the said parochial or other district, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments, will be necessary for that purpose, it shall and may be lawful to and for the said commissioners or trustees, or other persons, as aforesaid, and they shall have full power and authority to treat, contract, and agree, or to employ any person or persons to treat, contract, and agree, with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, and hereditaments, of whatsoever nature, tenure, kind, or quality, for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said commissioners or trustees, or other persons, as aforesaid; and the owner or owners, occupier or occupiers, thereof, out of the money to arise and be raised and to be received by them, either by virtue of any local Act or Acts of Parliament relating to such parochial or other district, or of this Act, and to pull down, use, sell, or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also such other lands, tenements, or hereditaments, or so much thereof as they, the said commissioners, or trustees, or other persons, as aforesaid, shall think proper, into the said streets or other public places; and all such new parts of such streets or public places, and the owners and occupiers of houses, buildings, messuages, and other hereditaments therein and adjoining thereto, shall be subject and liable to all the rates, assessments, powers, provisions, orders, clauses, and things to be made by virtue of or contained in any local Act or Acts of Parliament relating to such parochial or other district, or by virtue of or contained in this Act,

in the same manner as the present streets and public places included in any such local Act or Acts, or within the jurisdiction of this Act, and the owners and occupiers of houses or buildings, and messuages, or other hereditaments therein and adjoining thereto."

[THE LORD CHANCELLOR said, that under this Act the commissioners had a discretion which they must exercise in the manner pointed out by the Act, and asked what the commissioners had adjudged on the subject; the following was produced, not having been produced before the Vice-Chancellor:—

"10th Oct. 1866.

"At a Court of the Commissioners of Sewers it was resolved—

"That this Court is of opinion, and doth adjudge, that it will improve *Threadneedle Street*, and be for the public advantage, if a piece of land, parcel of the site of the house and premises, No. 50 in the said street, be cleared and thrown into the said street, and dedicated to the public use, and that the solicitor do serve notices on the parties interested in the said house, No. 50, *Threadneedle Street*, to purchase and obtain possession of the said house and premises under the powers and provisions of 57 Geo. 3, c. xxix."]

Mr. *Glasse*, Q.C., and Mr. *Speed*, for the Plaintiffs, argued that the commissioners must shew that the piece of land was necessary for the purpose of widening the street. If they only want seven feet they can have it, but must not take our house with the intention of making a profit by it. If the building was one hundred feet deep, might they take it all in order to get seven feet of the front? It is true that they are required to sell the land, but not for five years: *Galloway* v. *Mayor and Commonalty of London* (1), and *Pulling* v. *London Chatham and Dover Railway Company* (2), were cited.

Mr. *Pontifex*, in reply.

November 8. LORD CHELMSFORD, L.C.:—

At the conclusion of the argument yesterday, I intimated my concurrence generally in the judgment of the Vice-Chancellor,

(1) Law Rep. 1 H. L. 34. 12 Jur. N. S. 747

(2) 33 Beav. 644; 33 L. J. (Ch.) 505. 10 Jur. N. S. 665.

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although I was not disposed to agree exactly with the reasons which appear to have governed His Honour's decision.

But I was anxious, before pronouncing a decided opinion upon the case, to have an opportunity of carefully considering the section of the Act of Parliament upon which the whole question turns, and which had been subjected to a very close examination in the course of the argument on both sides. The Vice-Chancellor seems to have rested his judgment upon a distinction, which it appeared to him had been established by the Legislature, in the compulsory powers conferred upon the commissioners of taking houses or lands:—that where a house projected partially into a street directed to be widened, it was for the interest of the public that the whole should be taken; but with respect to a piece of land without any buildings upon it, the portion only which was required to be laid into the street was within the power of the commissioners. And the Plaintiffs having agreed with the landlord to take down the two houses, Nos. 49 and 50, *Threadneedle Street*, and build a new house on the site, although the house, No. 50, was still standing, he thought that he was bound to treat it not as a house, but as a piece of land. And His Honour accordingly declared that the Commissioners of Sewers were not entitled, without the consent of the Plaintiffs, to take the whole of the piece of land, being the site of No. 50, *Threadneedle Street*, and granted the decree for an injunction, which is the subject of the appeal.

The Act under which the Commissioners of Sewers assumed the power to take the Plaintiffs' premises is the 57 Geo. 3, c. xxix., intituled "An Act for better paving, improving, and regulating the Streets of the Metropolis, and removing and preventing Nuisances and Obstructions therein." By the 80th section it is enacted as follows:—[His Lordship read the section.] This section is rather obscurely worded, but it appears to me to give the commissioners power, if they please, to take part only of a house or building which may project into, obstruct, or prevent them from altering or widening any street. The words "or any part thereof" in the early part of the section clearly apply to houses and buildings as well as to lands. But it is said that those words are dropped as the section proceeds; that in stating the persons with whom the commissioners are to treat, they are called the owners

or occupiers of all such houses, walls, buildings, lands, and hereditaments without these additional words; and that the commissioners are empowered to pull down, use, sell, or dispose of such houses, walls, buildings, and materials thereof, which it was said must mean the entire houses, &c., not only from there being no qualification of the general words, but from the distinction which is made in what immediately follows between houses and lands in the words, "and lay the sites thereof" (that is, of the houses, &c.), "and also such other lands, &c., or so much thereof as the commissioners shall think proper, into the streets or other public places." I cannot help thinking, however, that, imperfectly as it may be expressed, the words "or so much thereof" must be construed to apply to houses as well as to lands, otherwise this absurdity would follow—that the commissioners would be imperatively bound to lay the whole of the sites of the houses into the streets. It appears to me that the subsequent parts of the section do not affect the preceding part, so as to strike out altogether the words "or any part thereof," or to render them of no effect.

But although I have arrived at this conclusion, I think that in every case of an intended widening or altering a street, it is competent to the commissioners to adjudge that the whole of a house or building obstructs or prevents this object. If this is honestly done, although erroneously, I think it cannot be questioned. The only consequence of the commissioners taking more than they require for the street would be that, under the 96th section, they would have to sell it subject to a right of pre-emption in the person from whom the house or building was purchased. But whether they intend to take the whole, or only a part, it is essential as a preliminary step that the commissioners should adjudge that the house, or the part required, prevents them from altering or widening the street, and that the possession of such house (and I add, or such part thereof) is necessary for that purpose. Upon reading the section it occurred to me that, without such an adjudication, all the proceedings of the commissioners for the purpose of compulsorily taking the Plaintiffs' premises would be void; and upon inquiring whether this preliminary step had been taken, a resolution of the commissioners was handed to me, which

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was not seen by the Vice-Chancellor. That resolution is in these terms:—[His Lordship read it.]

Now it must be observed that there is no schedule in the Act of houses or lands which may be taken by the commissioners. Each adjudication of the commissioners becomes a specific description of the property which may be taken. In this case the resolution of the commissioners is, that a part of the site of the house, No. 50, is necessary for the purpose of the Act. They do not adjudge that the whole of the house or site is required. Consequently as far as respects this, the essential preliminary, the adjudication of the commissioners is wanting. Upon this short ground, therefore, I come to the conclusion that the declaration in the decree of the Vice-Chancellor, that the commissioners were not entitled, without the Plaintiffs' consent, to take the whole of the Plaintiffs' land, is right, that the Plaintiffs are entitled to the injunction, and that the decree must be affirmed with costs.

Solicitor for the Plaintiffs: Mr. *A. J. Baylis.*
Solicitors for the Defendants: Messrs. *Wootton & Son.*

L. C. 1866 *Nov.* 8, 9.

SHEFFIELD WATERWORKS *v.* YEOMANS.

Pleading—Demurrer—Bill of Peace.

Where a large number of persons have similar legal claims against one, he can, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims has been decided.

Where a Judge has considered that the question raised by a bill ought not to be decided on demurrer, the Court of Appeal will not ordinarily overrule his decision.

THE bill in this case was filed against *John Yeomans* and five Defendants on behalf of themselves and all other the persons named in any of certain pretended certificates, and stated, that in March, 1864, a reservoir belonging to the *Company of Proprietors of the Sheffield Waterworks*, the Plaintiffs in this case, burst, and occasioned an inundation, whereby many persons lost their lives,

and the property of very numerous persons was damaged. That, by the *Sheffield Waterworks Act*, 1864, commissioners were appointed who were to inquire into the damages occasioned by the inundation, and any person claiming damages under the Act was directed to lodge a statement of his claim at the office of the commissioners. Where on any claim damages were assented to by the company, or assessed by the commissioners, the costs of the claimants were to be borne and paid by the company, and the commissioners were to certify accordingly. All such costs were to be payable by the company at the expiration of six months after the making of the commissioners' general certificate, but were, in case of difference, to be taxed and settled on production of a certificate of the commissioners by a Master of a superior Court of law at *Westminster*. If any costs payable under the Act were not paid within twenty-eight days after demand in writing, the certificate of the commissioners respecting such costs should have the effect, as against the company, of a judgment recovered for the amount of such costs. That the claimants for compensation under the Act were 7315 in number, and many of them were poor and ignorant, and employed improper persons to represent them; and the commissioners, therefore, made a regulation that no certificate should be issued except to the claimant in person. That there was a difference of opinion between the commissioners as to whether the powers of the commissioners had not expired, and 1500 certificates, which the Plaintiffs alleged to be invalid, were delivered by some of the commissioners to the Defendant *John Yeomans*, the town clerk of *Sheffield*. That unless the Court interfered, the Defendant *John Yeomans*, and other persons by his permission, would produce these invalid certificates and have them taxed, whereupon judgment would be issued, and such proceedings would seriously prejudice the Plaintiffs, by compelling them to defend themselves on very numerous improper taxations, occasioning them very large costs and expenses. That the question whether these certificates were valid or invalid was the same as to all of them, and that the persons named therein were too numerous to be made Defendants, but were properly represented by five of them, who were named as Defendants.

And the bill prayed that the Defendant *John Yeomans* might

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be restrained from delivering these certificates except as the Court should direct, and that the Defendants and all other persons named in any of these certificates might be restrained from having them taxed, or procuring any taxation or judgment against the Plaintiffs, and that all these certificates might be delivered up to be cancelled, and, if necessary, that it might be declared that the same were invalid.

To this bill the Defendants, except *Yeomans*, demurred, and the Vice-Chancellor *Kindersley* overruled the demurrer (1).

The five demurring Defendants appealed.

Mr. *Baily*, Q.C., and Mr. *Rodwell*, for the demurrer, contended that the certificates were valid, and the rights of the claimants to costs were made absolute by the Act. The Court of law would be able to decide the questions: *Re Wraithby* (2).

(1) March 7. Vice-Chancellor *Kindersley* said:—

There were in this case a number of persons, each alleging that he was entitled, as against the company, to be paid a certain sum to be ascertained in respect of costs. Each claim was founded on the same state of circumstances, and what would be successful in one case would be so in all. Each insisted that he was entitled to have out of the custody of the town clerk these documents, in order to adopt the process under the Act to recover the costs—that is, to go to the taxing-master, and get judgment entered up, and issue execution. It was, therefore, the case of one body against a number of separate individuals, each claiming as against the one body a certain right, the right being the same in all, and the same reasons and arguments applying to all. Now the question was, whether this was not precisely a case for a bill of peace, *quoad* the form and nature of the bill. Where there were a number of persons claiming as against one, or one person against a number, and where all were claiming alike, that was a case for a bill of peace; and this came within the true object of such a bill. The bill sought to restrain the issuing of the documents pending the question, and so far the demurrer could not be sustained.

The Vice-Chancellor then said that the other question was, whether the documents ought to be delivered up and cancelled, or whether the parties ought to be allowed to have them, and pursue their legal remedy. That depended on whether these were proper certificates, and that again depended on all the details and facts as to what was done by the commissioners and their clerk, by their direction.

The Vice-Chancellor refused under the circumstances to decide that question on demurrer, as it was a question for the hearing, and said that the demurrer must be simply overruled, reserving to the Defendants the benefits thereof at the hearing, and reserving the question of costs.

(2) 11 Jur. (N.S.) 954.

Mr. *Glasse*, Q.C., and Mr. *Bagshawe*, for the bill, cited *Story's* Equity Jurisprudence (1).

Mr. *Lindley*, for the Defendant Mr. *Yeomans*.

Mr. *Baily*, in reply.

LORD CHELMSFORD, L.C.:—

The Vice-Chancellor appears to have decided this case against the Defendants on two grounds: First: That the bill was a bill of peace, and therefore proper in its form and character. Secondly: That the point raised by the demurrer depended upon questions of fact which had to be proved, and that ought therefore to be reserved for the hearing. His Honour accordingly overruled the demurrer, reserving to the Defendants the benefit of it at the hearing, and reserving till the hearing the costs of the demurrer.

Perhaps, strictly speaking, this is not a bill of peace, as the rights of the claimants under the alleged certificates are not identical; but it appears to me to be within the principle of bills of this description. The rights of the numerous claimants for costs all depend upon the same question—the validity of certificates sealed under the circumstances stated in the bill. Each of the 1500 persons, if he obtained the certificate from Mr. *Yeomans*, might produce it to a Master of one of the superior Courts of common law, and obtain as a matter of course a taxation of the costs. He might then enter up judgment and sue out execution, and no application could be made in any of the common law Courts to stop the proceedings, although it may turn out in the result of this suit that the certificates are wholly invalid. It is true that, if the certificates have no validity, a motion might be made in the Court where judgment was entered up, and from which the execution issued, to set aside that execution, but not until considerable expense had been incurred, and possibly after the same course of proceeding to judgment and execution had been taken by many of the claimants. It seems to me to be a very fit case, by analogy, at least, to a bill of peace, for a Court of equity to interpose and prevent the unnecessary expense and litigation which

(1) Vol. ii. §§ 853, 854.

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would be thus occasioned, and to decide once for all the validity or invalidity of the certificates upon which the claims of all the parties depend.

The remaining question is, whether the question ought to be decided upon demurrer. It was pressed very strongly upon me that this was always considered to be a matter entirely for the discretion of the Judge, and that no case could be produced in which, when it had been determined in the Court below that the question ought not to be disposed of upon demurrer, the Appeal Court had overruled that decision. Whether any such case can be found or not (and none has been produced), it seems to me that where a Judge of great experience and judgment has arrived at the conclusion that a case ought not to be decided upon demurrer, whether on account of its importance, or by reason of facts and circumstances which he considered necessary to be found in order satisfactorily to decide the question raised by the bill, it would not be a proper exercise of the authority of an appellate Court to overrule this decision, unless it was satisfied that the whole case was open upon the demurrer. I agree, however, with the Vice-Chancellor, that the question of the validity of the certificates for costs is not capable of a satisfactory determination without the proof of facts which are not admitted by the demurrer, and I must decline to anticipate such proof by deciding the case upon the pleadings as they stand; therefore, the Vice-Chancellor's order appealed from must be affirmed, and the appeal dismissed with costs.

Solicitor for the Plaintiffs: Mr. *W. Pitman.*
Solicitor for the Defendants: Mr. *A. Duncan.*

SHORT *v.* ROBERTS.

L. C.
1866
Nov. 22.

Practice—New Orders—Jurisdiction—15 & 16 Vict. c. 86, s. 63.

Where the practice of the Court is regulated by 15 & 16 Vict. c. 86, any order of Court purporting to alter it must be made with the advice and assistance of three other Judges, and cannot be made by the Lord Chancellor alone.

THE Plaintiff in this case had set down a motion for decree before the time had expired within which he could file affidavits in reply. The Defendant thereupon moved, before the Vice-Chancellor *Stuart*, that the entry might be struck out, relying on an order dated the 6th of October, 1866, purporting to be a General Order of Court made by the Lord Chancellor, by and with the advice and assistance of the Master of the Rolls and the Vice-Chancellor *Kindersley*, and signed *Chelmsford*, C., *Romilly*, M.R., *Richard T. Kindersley*, V.-C., which would alter the practice in this respect (1).

(1) "Court of Chancery—Order of Court—Saturday, the 6th day of October, 1866.

"The Right Honourable *Frederick* Baron *Chelmsford*, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable *John* Lord *Romilly*, Master of the Rolls, and the Honourable the Vice-Chancellor Sir *Richard Torin Kindersley*, doth hereby, in pursuance of the statute 15 & 16 Victoria, chapter 86, and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following:—

"1. Article 1, of Rule 10, of Order XXXIII., of the Consolidated General Orders, and Rules 12 and 13 of the same Order, shall be respectively varied, and as varied shall be respectively read as follows:—

"Article 1, of Rule 10, of Order XXXIII., and Rule 12 of the same Order, shall be respectively read as if the words 'or set down a motion for a decree or decretal order' were expunged therefrom respectively, and in lieu of those words the words 'or serve a notice of motion for a decree or decretal order' were inserted therein respectively.

"And Rule 13 of the same Order shall be read as if the words 'unless a motion for a decree or decretal order shall have been set down in the meantime' were expunged therefrom, and in lieu of those words the words 'unless a notice of motion for a decree or decretal order shall have been served in the meantime' were inserted therein.

"2. The Plaintiff who has served a notice of motion for a decree or decretal order shall set down such motion within one week after the expiration of the time allowed to him by Rule 7 of Order XXXIII. to file his affidavits in reply, in case the Defendant shall have filed any affidavit, or within one week after the

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The Vice-Chancellor *Stuart* considered that the order was invalid, as the statute 15 & 16 Vict. c. 86, under which it purported to have been made, required the concurrence of three Judges with the Lord Chancellor, and the Vice-Chancellor refused to make any order on the motion.

The Defendant now renewed the motion by way of appeal.

Mr. *G. W. Collins*, in support of the motion:—

Though the order is only signed by two of the Judges, and may not come under the provisions of the Act, the Lord Chancellor has jurisdiction alone to make such an order. The Lord Chancellor could always regulate the practice of the Court, either by general orders, or by orders which became precedents (1). The order is entirely within the powers of the Lord Chancellor, and, even if it were not, the Act 3 & 4 Will. 4, c. 94, ss. 22 and 23, gives power to the Lord Chancellor and one Judge to alter the practice at any time.

Mr. *A. Smith*, on the other side, was not heard on this point.

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expiration of the time allowed to the Defendant by Rule 6 of Order XXXIII. to file his affidavits in answer, in case the Defendant shall not have filed any affidavit. But in case the time allowed for either of the purposes aforesaid shall be enlarged, then within one week after the expiration of such enlarged time.

"3. If the Plaintiff shall fail to set down the motion within the time above limited, the Defendant may either move to dismiss the bill with costs, for want of prosecution, or set the motion down at his own request.

"4. The Clerk of Records and Writs shall not give a certificate that a motion for a decree or decretal order is in a fit state to be set down until after the expiration of the time allowed to the Plaintiff by Rule 7 of Order XXXIII. to file his affidavits in reply, in case the Defendant shall have filed any affidavit, or until after the expiration of the time allowed to the Defendant by Rule 6 of Order XXXIII. to file his affidavits in answer, in case the Defendant shall not have filed any affidavit. But in case the time allowed for either of the purposes aforesaid shall be enlarged, then not until after the expiration of such enlarged time.

"5. In all cases in which the time allowed by Rules 6 and 7 of Order XXXIII. for filing affidavits in answer, or in reply, shall be enlarged, notice thereof shall be given to the Clerk of Records and Writs, by production of the Order for such enlargement.

"*Chelmsford*, C.
"*Romilly*, M.R.
"*Richard T. Kindersley*, V.C."

(1) *Beames'* Chancery Orders, Preface; 2 Russ. App. p. 4.

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LORD CHELMSFORD, L.C. :—

The practice of motions for decree was introduced by the Act 15 & 16 Vict. c. 86, s. 15, and by s. 63 the Lord Chancellor, by and with the advice of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or any three of them, may make general rules and orders for carrying the purposes of this Act into effect, and for regulating the mode of procedure and practice of the Court in respect of the matters to which this Act relates, and such rules and orders may be rescinded or altered by the like authority. Now, when the Legislature says that the rules and orders for the purpose of carrying this Act into effect shall be made in a particular way, of course that must be understood to mean that rules or orders shall not be made in any other manner. If the Legislature had said nothing about it, the Lord Chancellor alone could have made orders, but here the statute points out the way in which orders as to these matters are to be made and rescinded. The Consolidated General Orders, though there is no express reference to this statute, were made with the advice and assistance of all the Judges, and cannot be altered, so far as they relate to matters such as this, except in the manner pointed out by the statute. The whole difficulty has arisen from an unfortunate mistake, and the motion must be refused, but the costs of all parties will be reserved until the hearing.

Solicitors for the Plaintiff: Messrs. *Morris, Stone, & Co.*
Solicitors for the Defendant: Messrs. *Monckton & Monckton.*

L. C. and L. JJ 1866 Dec. 5.

WILLIAMS *v.* WILLIAMS.

SC Post 29 S. n (1) 12 Jur N S 994

On the hearing of appeals, the Appellant will begin.

WHEN this cause was called, the Lord Chancellor stated to the Bar that he had, with the concurrence of the Lords Justices, determined that in future, on the hearing of all appeals, the Appellant should begin.

SC at hearing post p 194.

L. JJ.
1866
Nov. 3.

In re JOINT STOCK DISCOUNT COMPANY.

SHEPHERD'S CASE.

Company—Transfer—Rectification of Register—Contributory—Companies Act, 1862, *s.* 35.

S. executed a transfer of shares to *H.* in December, 1865. The transfer, according to the articles of association, required the sanction of the directors, who might refuse it in certain cases. The transfer was not left at the office for approval till the 3rd of March, 1866. In the ordinary course of business, the directors met once a week. Their last meeting had been on the 1st of March, and their next was to be on the 8th. On the 7th of March, a Petition to wind up the company was presented, and on the 17th a winding-up order was made. The transfer had never been registered:—

Held, that there had been no default or unnecessary delay on the part of the company in placing *H.* on the register of shareholders; and an application by *S.*, to which *H.* consented, to have the register rectified, and the name of *H.* substituted for that of *S.* on the list of contributories, was refused. Order of the Master of the Rolls affirmed.

THIS was an appeal from a decision of the Master of the Rolls, who had refused an application to place the name of Mr. *Higgs* on the list of contributories of the *Joint Stock Discount Company, Limited*, in the place of that of the Appellant, Mr. *Shepherd* (1).

The facts of the case appear in the former report, but, owing to the turn which it took before the Court of Appeal, it is necessary to add that the transfer was left at the office of the company, late on the 2nd, or early on the 3rd of March. The directors met once a week for the transaction of ordinary business. Their last meeting had been on the 1st of March, and their next would, in regular course, have been on the 8th, the day following the day on which the winding-up Petition was presented.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the Appellant:—

The contract was complete in December between the transferror and transferree, and there is no dispute between them on the present occasion. The directors had a power of refusing their consent to a transfer, but not an arbitrary power; they could only refuse if the transfer was made for purposes not for the interest of the company, or

(1) Law Rep. 2 Eq. 564.

if the transferror was indebted to the company. There is no pretence here for alleging that either of these grounds for refusal exists, and the directors have never examined the transfer and exercised a discretion. There being in the present case no right to exercise the power of refusing to register the transfer, the case is on the same footing as if the articles contained no such power. The case is governed by *Emmerson's Case* (1). It was the duty of the directors to approve of this transfer, and the case must be looked at as if they had done so.

Mr. *Locock Webb*, for Mr. *Higgs*, supported the appeal.

Their Lordships having intimated that this was, in substance, an application to rectify the register of shareholders, the case proceeded, by consent of the official liquidator, as if such an application had been made.

Mr. *Jessel*, Q.C., and Mr. *Roxburgh*, for the official liquidator:—

Looking at the dates it was clearly impossible for the directors, in the ordinary course of business, to have taken the transfer into consideration before the time when the winding-up Petition was presented. The ordinary board meetings at which transfers were taken into consideration were held once a week. The last was held on the 1st of March, before this transfer was left; the regular day for the next was the 8th, before which day the Petition had been presented. The Appellant talks of its being the duty of the directors to register this transfer, but it could not be their duty to hold a special board meeting for the purpose. There was no default or unnecessary delay, so as to bring into operation the 35th section of the *Companies Act*, 1862. Then, as regards transfers being made for purposes not conducive to the interests of the company, there is no need for such purposes to be special to the particular transfer. There might be circumstances in which any transfers would be injurious, for when a company has become insolvent, the transfers will not be from poor men to rich ones. The resolution of the 5th of March was, in the circumstances, consistent with the duty of the directors.

Mr. *Baggallay*, in reply.

(1) Law Rep. 2 Eq. 231; 1 Ch. 433.

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SIR G. J. TURNER, L.J.:—

If in this case it had been necessary to give any opinion upon the effect of the 10th clause of the articles of association, we probably might have desired time for further consideration. But it seems to me that there are grounds for deciding the case without reference to the particular terms of the resolutions which have been passed by the directors, under the powers given to them by that clause. Every shareholder in this company is entered upon the register book, and by the 8th article it is provided that "the instrument of transfer of any share in the company shall be executed both by the transferror and transferree, and the transferror shall be deemed to remain a holder of such share until the name of the transferree is entered in the register book in respect thereof." According to the terms of this article, therefore, Mr. *Shepherd's* name would stand upon the list of contributories. That being so, some special ground must be made out for exempting him, and the case then depends upon the provisions of the 35th section of the *Companies Act*, which enables a rectification of the register to be made. By that section it is provided that, "If the name of any person is without sufficient cause entered in or omitted from the register of members of any company under this Act, or if default is made, or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's superior Courts of law or equity, or by application to a Judge sitting at Chambers, or to the Vice-Warden of the Stannaries, and, as respects *Scotland*, by summary petition, apply that the register may be rectified." According to this section, in order to maintain Mr. *Shepherd's* case, it is necessary for him to shew that there was default or unnecessary delay on the part of the company in entering on the register the transfer of his shares to Mr. *Higgs*. But how do the facts stand? The transaction between *Shepherd* and *Higgs* takes place in the month of December, the transfer is completed as between the parties, but nothing is done as between either party and the company until the 3rd of

March. According to the course of practice of this company, the ordinary meetings of the directors were held once a week, and their last weekly meeting was on the 1st of March. It was not, therefore, until the 8th of March that, in the ordinary course of business of the company, the consideration of this transfer could come under the notice of the directors. But before the 8th of March arrived, the Petition, on which the winding-up order was afterwards made, had been presented, and then, under the provisions of the Act, any transfer or dealings in the shares of the company became inoperative, because the winding-up order takes effect from the time of the presentation of the Petition. I think, therefore, this is not a case in which it can be said that there was any default, or any unnecessary delay, on the part of the company in entering the name of *Higgs* on the register; and if *Shepherd* has been damnified by the course which has been taken, it seems to me his remedy must be, not against the company, or any of the directors of the company, but against *Higgs*, if *Higgs* was the person who was bound to carry in the transfer for registration. I do not say whether he was bound or not. If he was not, then it was *Shepherd's* own duty to have done so, and he cannot recover against the company in respect of his own neglect. If, on the other hand, *Higgs* was so bound, then he must be liable to *Shepherd* for the consequences. Upon this special ground, and without laying down any general rule for the 200 cases which are stated to depend upon this decision, it seems to me that in this particular case, where the transfer was not carried in in such time as to give the directors an opportunity of considering whether it should be sanctioned or not, the order of the Master of the Rolls is right, and this appeal must be dismissed.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion. It was very properly admitted that this must be looked at (whatever the form of the motion may be) as in reality a motion under the 35th section of the *Companies Act*, 1862. The 35th section provides that, "if default is made, or unnecessary delay takes place, in entering on the register the fact of any person having ceased to be a member of the company," then the Court is at liberty to rectify the register. Now

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SHEPHERD'S CASE.

a winding-up Petition was presented on the 7th of March, and no alteration in the register could be made after that time. Therefore the question seems to me to turn upon what took place before the 7th of March. Could it be said, on that day, that default had been made, or that any unnecessary delay had taken place in entering on the register the fact of Mr. *Shepherd* having ceased to be a member of the company? How are the facts as to that? The transfer is made on the 16th of December, more than two months before the winding up of the company commenced. It is admitted on both sides to be a transfer which, as between the parties, is not open to any question. It is not brought in for registration until the 3rd of March. The question therefore becomes a very narrow one—namely, what is the state of things between the 3rd and 7th of March? Now let us see what was the ordinary practice of the company. Mr. *Westropp* says, "The transfers generally lay a week in the office. After that time they went before the daily committee; the daily committee investigated the facts relating to the transfer, and reported to the directors, who may confirm or not, as they please, the report of the daily committee." Therefore, in the ordinary course of business, one would say that the operation of approving a transfer would occupy not less than a week, and perhaps not less than a fortnight. The 3rd of March was the day when the transfer was carried in. What was the state of circumstances with regard to the directors at that time? There had been a number of new directors appointed on the 28th of February, a few days before. They had just taken office. They held, on the 3rd of March, a special meeting. They found an accumulation of transfers in the office, to the number, it is said, of about 200. They passed a resolution which, I own, seems to me to have been a very reasonable and sensible one. I suppose, thinking it possible that there might be a registration of all these transfers made as a matter of course, they, by way of direction to their officer, passed a resolution that the transfers then in the office should not be registered without the express sanction of the directors. I understand the directors as saying by this resolution, "We reserve to ourselves the sole exercise of the right to look into the circumstances of each transfer, and we give notice to our officer that, until we have

pronounced an opinion upon the transfers, he is not to register them." Of course they ought not to take any unreasonable length of time for doing that; but did an unreasonable length of time elapse? This resolution was passed on the 3rd of March, the Petition was presented on the 7th; and it seems to me impossible to say, in the words of the Act of Parliament, that on the 7th, the day on which the winding-up commenced, and after which nothing could be done, unnecessary delay had taken place in entering upon the register the fact of Mr. *Shepherd's* having ceased to be a member of the company. On these grounds it seems to me the order of the Master of the Rolls is right, and that the motion ought to be dismissed.

Solicitors for *Shepherd* and *Higgs:* Messrs. *Harrison, Lewis, & Co.*
Solicitors for Official Liquidator: Messrs. *Lawrance, Plews, & Boyer.*

DIMMOCK *v.* HALLETT.

Vendor and Purchaser—Puffing—Sale without Reserve—Particulars of Sale—Misrepresentation.

An estate being sold by the Court at the suit of a mortgagee, with liberty to all parties to bid, the auctioneer stated in the sale-room that the sale was without reserve, but that the parties were at liberty to bid. The Plaintiff bid at the sale, and ran the purchaser up from £14,000 to £19,000, without any other bidder intervening:—

Held, that the purchaser was not entitled on this ground to be discharged.

The particulars of sale described a farm, forming about a third of the estate sold, as late in the occupation of *A. B.*, at the rent of £290. *A. B.* had occupied the farm, which contained a good deal of grass land, as yearly tenant, at £290, but went in at Midsummer, paying only £1 for the first quarter, and quitted at Michaelmas in the next year, thus paying £291 for a year and a quarter. Since this the Plaintiff had agreed to let the farm at £225; but the agreement had been rescinded before taking possession, and the evidence shewed that the farm would not let for nearly so much as £290:—

Held, reversing the order of *Stuart*, V.-C., that there was such substantial misrepresentation as entitled the purchaser to be discharged.

THIS was an appeal, by a purchaser under a decree, from an order of Vice-Chancellor *Stuart*, dismissing with costs a Petition to release him from his purchase.

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In the suit, which was by a mortgagee in possession, to whom about £15,000 principal and an arrear of interest were due, amounting in all to about £19,000, a decree had been made for sale of the estate, which consisted of about 934 acres. The conduct of the sale was given to the Plaintiff, and liberty was given to all parties to bid. The sale took place on the 25th of January, 1866.

The particulars described the property as "fertile and improvable land," and stated that "all this property is situate in the district known as the *South Level*, and is within the limits of the powers conferred by the *Hatfield Chase Warping and Improvement Acts*, 1854 and 1861, whereby, in course of time, it may be covered with deposit, locally termed 'warp,' from the waters of the River *Trent*, and considerably improved at a moderate cost." The 13th condition was as follows: "If any mistake be made in the description of any of the lots, or any other error shall appear in the particulars of the estate (except as to the quantity of land, which shall be taken as stated, whether more or less), such mistake or error shall not annul the sale, but the vendor or purchaser shall give or take a compensation or equivalent as the case may require, and which compensation or equivalent shall be settled by the said Judge at Chambers."

Part of this property was a farm called *Bull Hassocks Farm*, containing 300 acres, described in the particulars as "Lately in the occupation of Mr. *R. Hickson*, at an annual rent of £290 15*s*. Now in hand." Another farm, called *Creyke's Hundreds*, containing 115 acres, was mentioned as "let to Mr. *R. Hickson*, a yearly Lady Day tenant (old style) at £130 per annum." Another farm, *Misson Springs*, containing 131 acres, was mentioned to be "let to Mr. *F. Wigglesworth*, a yearly Lady Day tenant (new style) at £160 per annum." As to the other parcels, some were stated to be vacant; as to others, it was mentioned that the tenants had given notice to quit, and others were stated to be in the occupation of yearly tenants, stating the rentals.

The conditions did not state the sale to be without reserve, nor did they state the fact that the parties to the cause had liberty to bid. The auctioneer stated in the auction room that the sale was without reserve, and five witnesses on behalf of the Plaintiff

stated that he added that the parties interested in the estate were at liberty to bid. The property was put up in one lot, and there were three bidders—the Petitioner, Mr. *Baxter*, the solicitor for the *Hatfield Chase Draining and Warping Company*, and the Plaintiff. Mr. *Baxter* ceased bidding at £14,000, and a competition then went on between Mr. *Dimmock* and the Petitioner, until the property was knocked down to the latter at £19,000. The Petitioner deposed that, though he knew that a Mr. *Dimmock* was bidding against him, he did not know that he was a person interested in the property. The bidding by Mr. *Dimmock* was one ground on which the Petitioner sought to be relieved from his purchase.

There was some evidence to shew that a considerable portion of the land was very bad, and that the cultivation of some of it had, in consequence, been abandoned.

The land was all within the limits of the powers of the local Act referred to in the conditions: but it was in evidence that a canal, by means of which the warping operations were conducted, did not yet come within three miles of the estate, and that the expenses of warping, when it could be effected, would be above £25 per acre.

The *Bull Hassocks Farm* had been taken by *R. Hickson* at Midsummer, 1863, from *Dimmock*, who was then mortgagee in possession, at the rent of £1 till Michaelmas, the tenant paying rates and taxes, and from that time at the rent of £290 15*s*. This farm contained about 150 acres of pasture. It had previously been let at a higher rent. *Hickson*, at Lady Day, 1864, gave notice to quit, and left it at Michaelmas, 1864. In May, 1865, a Mr. *Nelson* agreed to take this farm and *Creyke's Hundreds* at 15*s*. an acre. He never took possession, an agreement having been come to for rescinding the bargain on his paying the Plaintiff £20; the reason, as he alleged, being, that the land was not worth the rent; and the reason alleged by the Plaintiff being, that *Nelson* had no capital.

Hickson, at Michaelmas, 1863, had taken *Creyke's Hundreds* at £130 a year, as from Lady Day, 1864; but he, at Michaelmas, 1865, had given a notice to quit, which would expire at Lady Day, 1866.

Mr. *Wigglesworth* was occupying his farm at £160; but he also

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had given notice, at Michaelmas, 1865, to quit at Lady Day then next. He offered to continue his tenancy at £130 a year.

The purchaser presented a Petition praying that he might be discharged from his purchase, and Vice-Chancellor *Stuart* dismissed the application with costs.

Mr. *Malins*, Q.C., and Mr. *Wickens*, for the Appellant:—

The sale was stated to be without reserve. This means that no person interested in the property will bid: *Meadows* v. *Tanner* (1); *Cutts* v. *Salmon* (2). The bidding by a party interested is such puffing as will vitiate the sale: *Mortimer* v. *Bell* (3); *Flint* v. *Woodin* (4); *Bramley* v. *Alt* (5); *Sugden's* Vendors and Purchasers (6). The parol declaration of the auctioneer is admissible: *Winch* v. *Winchester* (7); *Marquis of Townshend* v. *Stangroom* (8); *Woollam* v. *Hearn* (9). The mortgagee was the person conducting the sale, who, therefore, according to the rules of the Court, ought not to be allowed to bid: *Domville* v. *Berrington* (10); and the Petitioner had a right to assume that the Mr. *Dimmock* whom he knew to be bidding against him was not the Plaintiff. On the above ground the purchaser ought to be discharged. But we say he also ought to be discharged on the ground of misrepresentation in the particulars. They represent the land as fertile and improvable, whereas it is almost a wilderness, and in part abandoned. They represent it as capable of cheap improvement by warping, when there are no means of warping within three miles of it, and the expense would be heavy. Then they are manifestly framed with a view of representing *Bull Hassocks Farm* as a farm which would let for £290 15*s.* a year, whereas the Plaintiff knew it would not let at anything like that sum. Then again the particulars represent as continuing tenants two persons who had given notice to quit their farms, which form a large part of the estate. These misrepresentations are not subjects of compensation, but grounds for annulling the contract.

Mr. *Bacon*, Q.C., and Mr. *Speed*, for the Plaintiff:—

As regards the alleged puffing, none of the cases cited apply.

(1) 5 Madd. 34.
(2) 16 Jur. 623.
(3) Law Rep. 1 Ch. 10.
(4) 9 Hare, 618.
(5) 3 Ves. 620.
(6) 13th Ed. p. 8.
(7) 1 V. & B. 375.
(8) 6 Ves. 328.
(9) 7 Ves. 211.
(10) 2 Y. & C. Ex. 723.

it being clearly shewn here that the auctioneer, upon stating that the sale was without reserve, stated also that the parties to the cause were at liberty to bid. The purchaser, therefore, had fair warning. The Plaintiff's bidding is not inconsistent with the sale being without reserve. In the case of a sole vendor bidding, if he is the highest bidder, there is no contract at all, for he cannot contract with himself; but here there was no bid made which would not have constituted a contract if there had been no higher bid.

As regards the alleged misrepresentations, the statement that the land is fertile is a mere advertising flourish, which cannot affect the contract. The statements as to the warping are not misrepresentations. It is not stated in the particulars within what time the warping can be done; and whether the cost is moderate is a matter of opinion. It would appear that the cost may fairly be called moderate, considering the increase of value; but, at all events, a vague statement of this kind only puts a purchaser on inquiry. As regards some of the tenants having given notice to quit, that is a trifling matter, which may entitle the purchaser to compensation, but not to rescind the contract. It was a mere inadvertent omission. The cases in which compensation has not been given, but the contract rescinded, are nearly all cases in which what the vendor had was something of quite a different nature from that which he contracted to sell, as *Stewart* v. *Alliston* (1), where property let at a rack rent was sold as let at a ground rent; *Duke of Norfolk* v. *Worthy* (2), where the distance of the estate from a town was three times greater than was represented; *Madeley* v. *Booth* (3), where an under-lease was sold as a lease; *Ayles* v. *Cox* (4), where an estate sold as copyhold was partly freehold; or, *Powell* v. *Doubble* (5), where a house partly brick, and partly timber, was described as brick-built. Small errors are a subject for compensation. The statements as to *Bull Hassocks Farm* are strictly true.

Mr. *Malins*, in reply:—

The bidding by Mr. *Dimmock* stands on just the same footing

(1) 1 Mer. 26.
(2) 1 Camp. 337.
(3) 2 De G. & Sm. 718.
(4) 16 Beav. 23.
(5) Sug. V. & P. 13th Ed. p. 23.

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as that of a sole owner; for the mortgagor being insolvent, and the estate all that he had to look to, he was bidding with perfect security so long as he did not bid beyond the amount of what was due on the mortgage.

SIR G. J. TURNER, L.J.:—

This is a Petition to discharge a purchaser under a decree. The first ground on which the application is rested is, that although the auctioneer stated at the sale that it was to be without reserve, Mr. *Dimmock*, who was a mortgagee in possession of the estate, and had the conduct of the sale, bid against the purchaser, and enhanced the price, so that Mr. *Baxter*, the only other bidder, having ceased bidding at £14,000, all the other biddings were between Mr. *Dimmock* and the purchaser, up to £19,000.

If these admitted facts formed the whole of the case, there would not, I think, be any room for doubt; for, if an auctioneer says that a sale is without reserve, every one must understand from that statement that no bidding is to be made on behalf of persons interested in the estate, and the purchaser would be just as much entitled to be discharged as if the conditions had stated the sale to be without reserve.

It is alleged, however, on behalf of the parties to the suit, that though the auctioneer did state that the sale was without reserve, he at the same time stated that the parties interested in the estate had liberty to bid. This is met on the part of the purchaser, not by a denial of the auctioneer having made the latter statement, but by a denial of the purchaser having heard it. The evidence before us establishes that the auctioneer did make the statement, several witnesses who were present at the sale having heard him make it, and without intending to impute to the purchaser any wilful misstatement, I am of opinion that we cannot judicially do otherwise than treat him as having heard and known that the parties interested in the estate had liberty to bid. The question then remains, what meaning is to be attributed to the statement that a sale is without reserve, but that the parties interested are at liberty to bid. The two branches of the statement are not very consistent, but I think that they may be read together by

taking the second as a qualification of the first; and if a purchaser knows that parties interested have liberty to bid, he cannot be entitled to be discharged on the ground that they have bid against him.

The purchaser further grounds his case on misrepresentations in the particulars. Some of the instances alleged appear to me to be unimportant. Thus I think that a mere general statement that land is fertile and improvable, whereas part of it has been abandoned as useless, cannot, except in extreme cases—as, for instance, where a considerable part is covered with water, or otherwise irreclaimable—be considered such a misrepresentation as to entitle a purchaser to be discharged. In the present case, I think the statement is to be looked at as a mere flourishing description by an auctioneer.

The next misrepresentation alleged is as to the warping. If the conditions had stated that the land could be covered with deposit within a limited time, and it appeared clearly that it could not be covered within that time, or if it had been stated that the process could be performed at a certain expense, and it was shewn that it could not be performed except at a much greater cost, the purchaser might probably have been entitled to the relief he seeks. But such a vague statement as that the land "*in course of time* may be covered with warp, and considerably improved *at a moderate cost*," puts a purchaser on inquiry, and if he chooses to buy on the faith of such a statement without inquiry, he has no ground of complaint.

The next alleged misrepresentation is much more important. A farm called *Bull Hassocks*, containing 300 acres, or nearly a third of the property put up for sale, is described as "lately in the occupation of Mr. *R. Hickson*, at an annual rent of £290 15*s*. Now in hand." The facts are, that this farm had been let at a higher rent than £290 15*s*. before *Hickson* became tenant. *Hickson* took the farm at Midsummer, 1863, at the rent of £290 15*s*. At Michaelmas, 1864, he left it, and there appears never to have been any actual tenancy between his leaving and the time of the sale. Mr. *Dimmock*, however, being in possession, agreed with a Mr. *Nelson* to let him *Bull Hassocks Farm*, and another farm called *Creyke's Hundreds*, containing 115 acres, at 15*s*. per acre,

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which would bring the rent of *Bull Hassocks Farm* to £225 at most. That agreement was not carried into effect, for *Nelson* desired to be relieved of the farm, and paid £20 to be off his bargain. Was it then fair and honest to describe the farm in the particulars as late in the occupation of *Hickson* at a rent of £290 15*s.*, when *Hickson* had been out of possession nearly a year and a half, within which period there had been an agreement to let the farm at a rent less by £65 than that paid by him. Such a description amounts to a representation to the purchaser that he will come into possession of a farm which will let for £290 15*s.*, whereas Mr. *Dimmock*, who had agreed to let it for so much less, knew that nothing near that rent could be obtained for it. But the matter does not rest there, for even the representation that the farm had been let to *Hickson* at £290 15*s.* was not correct. He had occupied it for a year and a quarter, paying only £1 for the first quarter; and this took place at a time of year when the occupation must have been beneficial; for the farm contained about 150 acres of pasture, which *Hickson* thus held at a nominal rent from Midsummer to Michaelmas. I am of opinion, therefore, that the particulars contain representations which were untrue, and calculated materially to increase the apparent value of the property. The Court requires good faith in conditions of sale, and looks strictly at the statements contained in them.

Again, *Creyke's Hundreds*, containing 115 acres, is described as let to *R. Hickson*, a yearly Lady Day tenant, at £130 per annum; and another farm, *Misson Springs*, containing 131 acres, is mentioned as let to *Wigglesworth*, a yearly Lady Day tenant, at £160 per annum. Now the sale took place on the 25th of January, 1866, and there is no reference made in the particulars to the fact that each of these tenants had given a notice to quit, which would expire at Lady Day. The purchaser, therefore, would be led to suppose, as to these farms, that he was purchasing with continuing tenancies at fixed rents, whereas he would, in fact, have to find tenants immediately after the completion of his purchase. I refer particularly to this, because as to some of the other farms it is stated in the particulars that the tenants had given notice to quit; so that the purchaser must have been led to believe that the tenants of *Creyke's Hundreds* and *Misson Springs* were con-

tinuing tenants. This again, as it seems to me, is a material misrepresentation.

The vendor contends that these are only errors, entitling the purchaser to compensation under the thirteenth condition of sale. I think that such a condition applies to accidental slips, but not to a case like the present, where, though I do not mean to impute actual fraud, there is what, in the view of a Court of equity, amounts to fraud—a misrepresentation calculated materially to mislead a purchaser.

I am of opinion, therefore, that the Petitioner is entitled to be discharged; but there has been so much negligence on his part that he ought not, I think, to have any costs.

SIR H. M. CAIRNS, L.J. :—

I am of the same opinion. The case raises questions of considerable importance, and, in my view, the Court ought not to be less strict as to sales under its own order than as to sales out of Court. It is first contended by the Petitioner that the sale is vitiated by *Dimmock* having bid at it. That argument depends upon the conclusion at which we arrive as to what took place at the sale, for the purchaser does not rest his case on the conditions, but on a statement made by the auctioneer; it is, therefore, incumbent on the Court to ascertain what did take place, and the whole of what took place, for it is not alleged that the purchaser was absent during part of the sale. I cannot but come judicially to the conclusion upon the evidence that the auctioneer repeatedly stated, not only that the sale was without reserve, but that all the parties were at liberty to bid. It remains to consider what that statement means. It appears to me to amount to this—that all parties were at liberty to bid, but that every bidding, if accepted, would make a contract. I think, therefore, that the purchaser is not entitled to be discharged on the ground of Mr. *Dimmock* having bid against him.

As regards the case of misrepresentation, I attach no importance to the statement as to the results of the estate being within the *South Level*. It was calculated to put a purchaser on his guard, and is a statement which certainly would not have made me very sanguine that the estate could be dealt with under the powers

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relating to the *Level* either very speedily or very cheaply. What is a "moderate" cost is a question which different people would answer very differently; and a statement that the cost will be moderate is too indefinite to amount to a misrepresentation. Then as to the omission to state that *Hickson* and *Wigglesworth* had given notice to quit, it is to be observed that the particulars, as regards the other holdings, stated that the tenants of them had given notice; it was, therefore, a fair inference that, when there was no such statement, the tenant had not given notice. The farms held by *Hickson* and *Wigglesworth* are important as regards size, and the purchaser would consider himself safe of his rent from these till Lady Day, 1867. The point is of importance to him, for if the tenants leave he must either find new tenants, or make allowances to the outgoing tenants. I think, therefore, that the omission is very material. I do not arrive at the conclusion that it was wilful. I believe the affidavit which states that it was accidental; and if it stood alone, it probably would only be a matter for compensation.

But as to *Bull Hassocks Farm*, why was it stated that this farm was late in the occupation of *R. Hickson*, at a rent of £290 15*s*.? Evidently this was put forward as a test of the value of the farm, and the particulars must be taken to say that it was a fair test. Is it a fair test? and can the vendor really have thought that it was so? As far as we can ascertain the facts, this farm was once occupied by a person named *Robinson;* there was an interval between *Robinson* and the next tenant *Simpson;* then another interval between *Simpson* and *Hickson*. *Simpson* paid more rent than *Hickson;* it was a falling property, and the vendor, if he gave any standard, was bound to give a fair one. Moreover, could it be said that *Hickson* did occupy at that rent? He held the farm from Midsummer, 1863, to the next Michaelmas, for £1; a farm containing 150 acres of pasture land, the occupation of which, for that quarter, was clearly valuable. He had the power of determining his tenancy at Michaelmas, 1864, which he exercised; so, in fact, he held the land fifteen months for £291 15*s*. But the matter does not rest there. When *Hickson* gave up the farm, the Plaintiff sought to obtain a tenant, and made a verbal arrangement with *Nelson* to come in at a rent of £225. The

Plaintiff, being a mortgagee in possession, was bound to obtain the best rent; it must, therefore, be taken that £225 was the best rent that could be obtained. He found that *Nelson* was not a man of capital, and he agreed, for a consideration, to rescind the arrangement; but this does not affect the question as to the rent. One of the Plaintiff's own witnesses can go no further than to say that he would give 16*s.* an acre for it. The statement as to the rent was calculated to mislead, and was not prepared with the good faith which is requisite in conditions of sale. I think that a misrepresentation of this nature affects the validity of the contract, and is not a matter for compensation, but entitles the Petitioner to be discharged. I agree as to the costs.

Solicitors for the Appellant: Messrs. *Mackenzie, Treherne, & Trinder.*

Solicitor for the Plaintiff: Mr. *W. J. Barrett.*

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August 1;
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Practice—Service out of the Jurisdiction—Consolidated Order X. r. 7.

The 7th rule of the 10th of the Consolidated Orders empowering the Court to order the service of a copy of a bill on a Defendant "in any suit" out of the jurisdiction, is not confined to suits relating to land, stock, or shares in *England*, within 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

Cookney v. *Anderson* (1); *Foley* v. *Maillardet* (2); and *Samuel* v. *Rogers* (3), overruled.

Order of *Stuart*, V.C., affirmed.

THIS was a motion by the Defendant by way of appeal from the decision of Vice-Chancellor *Stuart*, reported (4), who had held that, notwithstanding the decisions of Lord *Westbury*, in *Cookney* v. *Anderson* (1); *Foley* v. *Maillardet* (2); and *Samuel* v. *Rogers* (3); the Court had power, under Consol. Order X., rule 7, to order service of copy bill on the Defendant, who was an Englishman resident in *Scotland*, although the nature of the suit was not such as to bring it within the provisions of 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82. The appeal motion came on to be heard before the Lord Chancellor and the Lords Justices.

Mr. *Malins*, Q.C., and Mr. *W. Pearson*, for the appeal motion:—

We contend, first, that there was no jurisdiction to order service abroad in this case; secondly, that if there was, the case is one in which the Court ought to have declined to exercise it.

As to the first point, previous to 2 Will. 4, c. 33, the Court had no power to direct service out of the jurisdiction. The cases of *Bourke* v. *Lord MacDonald* (5); *Scott* v. *Hough* (6); *Shaw* v. *Lindsay* (7); and *Nichols* v. *Gwyn* (8), are explained by *Johnson* v. *Nagle* (9), since which there has been no doubt on the subject.

(1) 1 D. J. & S. 365.
(2) Ibid. 389.
(3) Ibid. 396.
(4) Law Rep. 2 Eq. 335.
(5) 2 Dick. 587.
(6) 4 Bro. C. C. 213.
(7) 18 Ves. 496.
(8) 1 Sim. 389.
(9) 1 Moll. 240.

Fernandez v. *Corbin* (1); *Lorton* v. *Kingston* (2); *Darwent* v. *Walton* (3); *Roberts* v. *Worsley* (4); and *Smith* v. *Hibernian Mining Company* (5), support our contention on this head. The powers of Courts are limited to the territory of the country in which they are situate, unless they are expressly enlarged by the Legislature: *Story's* Conflict of Laws (6). If the Court had any such power, why were the statutes passed to confer it? The first was 2 Will. 4, c. 33, which applied only to suits relating to land in *England*, and was extended by 4 & 5 Will. 4, c. 82, to suits relating to stock and shares in *England*. The preamble of the former Act shews that there was no previous jurisdiction to order service abroad. Then came the statute 3 & 4 Vict. c. 94, under which, as altered by 4 & 5 Vict. c. 52, the orders of May, 1845, were made. These statutes give powers to make orders regulating the practice of the Court, but do not extend its jurisdiction: *Cookney* v. *Anderson* (7). A statute giving a Court power to regulate its "mode of procedure," can only authorize a change in the mode of proceeding against persons against whom the Court could already proceed. The 33rd of the orders of May, 1845, is expressed in wide terms; and in *Whitmore* v. *Ryan* (8), Vice-Chancellor *Wigram* put upon it the most extended construction, and held it to authorize service abroad in any suit. We submit that this was erroneous. If the terms of an order go beyond the powers of the statute under which it is made, it ought to receive a restricted construction; and, indeed, we submit that the general provision, as to laying the orders before Parliament, could not give validity to anything contained in them which was beyond the scope of the Act. From that time down to *Cookney* v. *Anderson*, the question appears never to have been discussed. The jurisdiction seems to have been assumed, and the only discussion in each case was whether the circumstances were such that the Court, in its discretion, would exercise its jurisdiction by ordering service abroad. This was the case in *Innes* v. *Mitchell* (9). In *Blenkinsopp* v. *Blenkinsopp* (10),

(1) 2 Sim. 544.
(2) 2 Mac. & G. 139.
(3) 2 Atk. 510.
(4) 2 Cox, 389.
(5) 1 Sch. & Lef. 238.
(6) Page 539.
(7) 31 Beav. 452. 1 Jur. N.S. 1220.
(8) 4 Hare, 612.
(9) 1 De G. & J. 423. 3 Jur. N.S. 991.
(10) 2 Ph. 1.

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the suit related wholly to lands in *England*, as appears from the reports (1), so that there was jurisdiction under the statutes of Will. 4. In *Maclean* v. *Dawson* (2), there was land in *England*. But supposing *Whitmore* v. *Ryan* to give a correct interpretation of the general order, and the order to be warranted by the statute under which it was made, we say the case is now quite different. The statute 15 & 16 Vict. c. 86, ss. 63, 64, gives the power of making general orders, and directs that they shall be laid before Parliament, but does not contain any words giving them a statutory effect. Under this statute the Consolidated Orders were made; they abrogate all previous General Orders; therefore the 33rd Order of May, 1845, is gone, and Order x. rule 7, of the Consolidated Orders, not having statutory force, cannot effectually authorize service abroad. In *Cookney* v. *Anderson* (3), Lord *Westbury* laid down that the jurisdiction to order service abroad was confined within the limits of the statutes of Will. 4. In *Steele* v. *Stuart* (4), Vice-Chancellor *Wood* dissented from the observations of Lord *Westbury*, and declared himself not prepared to follow them, regarding them as extra-judicial, and the Master of the Rolls took the same line in *Curtiss* v. *Grant* (5). In *Foley* v. *Maillardet* (6), and *Samuel* v. *Rogers* (7), the point was formally decided, and Vice-Chancellor *Wood*, in *Norris* v. *Cotterill* (8), regarded himself bound by *Foley* v. *Maillardet*. The Vice-Chancellor, in the present case, however, considered himself at liberty to overrule it, proceeding on the assumption, which, we submit, is wholly unfounded, that Lord *Westbury* did not know that the Orders of 1845 had the force of a statute; and, in *Cory* v. *Jacobson* (9), Vice-Chancellor *Kindersley* followed Vice-Chancellor *Stuart*. We submit, however, that the decisions of Lord *Westbury* were binding on them, and are correct in principle.

Mr. *Osborne*, Q.C., and Mr. *John Pearson*, for the Plaintiff:—

Before the statutes of Will. 4, service out of the jurisdiction

(1) 10 Beav. 277; 12 Beav. 568.
(2) 4 De G. & J. 150.
(3) 1 D. J. & S. 365; 31 Beav. 452.
(4) 2 H. & M. 793.
(5) 9 Jur. (N. S.) 766.
(6) 1 D. J. & S. 389.
(7) Ibid. 396.
(8) 5 N. R. 215.
(9) 14 July, 1866.

could always be effected, though such service was of little use, since, if the Defendant did not appear, nothing more could be done: *Fernandez* v. *Corbin* (1); *Cookney* v. *Anderson* (2). The jurisdiction of the Courts of every country is founded on the allegiance of the subjects, and cannot be lost by their going abroad. Much confusion has arisen by treating want of power to enforce jurisdiction as tantamount to want of jurisdiction: *Hope* v. *Hope* (3). Aliens, while in a country, owe temporary allegiance, and so are subject to the jurisdiction. As to natural-born subjects, the Sovereign has a right to prevent their going abroad: *Ex parte Brunker* (4); or to command them to return home: *De Manneville* v. *De Manneville* (5). There cannot, therefore, be any breach of the comity of nations in serving an English subject abroad. The first object of process is to give the party notice, that he may be able to attend the proceedings. Other Courts exercise this power of service abroad: *The Mathesis* (6). The object of the statutes was to make that service effectual which before was ineffectual. It is clear, from *Official Manager of the National Insurance, &c., Association* v. *Carstairs* (7), that the Master of the Rolls did not consider the power to order service abroad to be confined to cases coming within the statutes. They are enabling statutes, and do not take away any power the Court previously had. Then the Act 3 & 4 Vict. c. 94, gives the Court power to make general orders, which shall have the binding effect of an Act of Parliament. In *Whitmore* v. *Ryan* (8), it was pressed on Vice-Chancellor *Wigram* that it could not be intended, by the general words in the statute, to include so much more than was authorized by the statutes of Will. 4, but the Vice-Chancellor considered that the Act and order were plain, and that there was nothing contrary to justice in such a power if exercised with discretion. It is true that *Blenkinsopp* v. *Blenkinsopp* appears, from the report of the hearing, to have fallen within the statutes of Will. 4, but that consideration was not presented to the Lord Chancellor. If it was intended to confine the 33rd Order of May, 1845, to cases within

(1) 2 Sim. 544.
(2) 31 Beav. 452.
(3) 4 D. M. & G. 328, 345.
(4) 3 P. Wms. 312.
(5) 10 Ves. 52.
(6) 2 Wm. Rob. Adm. 286.
(7) 9 Jur. (N. S.) 955.
(8) 4 Hare, 612.

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those statutes, why did not the order say so? The practice has been treated, in every branch of the Court, as settled by *Whitmore* v. *Ryan*. Lord *Westbury*, in some of his remarks in *Cookney* v. *Anderson*, as to the power of the Court to deal with natural-born subjects resident abroad, in fact admits our case. The Consolidated Orders, which re-enact the 33rd Order of May, 1845, with such variations only as were necessary to adapt it to the substitution of copy bill for subpœna, cannot affect its operation. It is no objection that the Court will probably not be able to enforce any order it may make: *Hope* v. *Hope* (1); *Spokes* v. *Banbury Board of Health* (2); and, indeed, we might get relief by attaching the Defendant if he were to come to *England*: *Preston* v. *Viscount Melville* (3).

Mr. *Malins*, in reply.

Dec. 6. LORD CHELMSFORD, L.C.:—

This appeal brings directly into question the decisions of Lord Chancellor *Westbury* in the two cases of *Cookney* v. *Anderson* (4), and *Foley* v. *Maillardet* (5). In those cases, his Lordship held that the 7th rule of the 10th of the Consolidated Orders, which, with the variations necessary to adapt it to the new practice introduced by the 15 & 16 Vict. c. 86, is identical with the 33rd of the General Orders of May, 1845, was beyond the competency of the Lord Chancellor and the Judges who concurred in its promulgation; and that their power to make orders as to the service of bills out of the jurisdiction of the Court, was confined to Defendants in such suits only as are described in the statutes of 2 Will. 4, c. 33, and 4 & 5 Will. 4 c. 82. This opinion, expressed by so high an authority, deserves the most attentive and careful consideration, more especially as it is at variance with the judgment of Vice-Chancellor *Wigram* in *Whitmore* v. *Ryan* (6), which appears to have been generally acquiesced in by the profession, and

(1) 4 D. M. & G. 328.
(2) Law Rep. 1 Eq. 42: 11 Jur. N.S. 1010
(3) 8 Cl. & F. 1, 13.
(4) 1 D. J. & S. 365: 9 Jur. N.S. 736.
(5) Ibid. 396: 10 Jur. N.S. 161
(6) 4 Hare, 612.

as all the present Vice-Chancellors have considered Lord *Westbury's* decisions to be opposed to the weight of authority in favour of the previously-existing practice.

The general principles laid down by Lord *Westbury* in *Cookney* v. *Anderson*, with regard to the exercise of extra territorial jurisdiction by the Courts of one country in another, apply rather to compulsory process than to the mere notification of proceedings. It may justly be considered to be an invasion of the jurisdiction of a country whenever an attempt is made to force one of its subjects, or any one under its protection and temporary allegiance, before a foreign tribunal. But the Legislature of every country has power to regulate the course of proceeding in its own Courts. If the question in this case depended upon the validity supposed to be given to the order in question by the 64th section of the 15 & 16 Vict. c. 86, I should be disposed to agree with Lord *Westbury* that the proviso in that section would not have the effect of giving a parliamentary sanction to the rules and orders not objected to if they exceeded the limits of the powers conferred by the Legislature. But that this is not the case will appear from an examination of the Acts of the 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, and the orders made in pursuance of them. It appears unnecessary to enter into any consideration of the practice with respect to parties out of the jurisdiction of the Court prior to the statutes. But it may be as well to correct some slight inaccuracies in *Vesey's* report of the case of *Shaw* v. *Lindsay* (1), and his note to that case, in which he states that, "it appears by the registrar's book that the order was finally refused, the cases cited" (being *Scott* v. *Hough*, and *Bourke* v. *Lord MacDonald*), "proving to be misreported." I have been furnished with a copy of the registrar's book, in the case of *Bourke* v. *Lord MacDonald*, by which it appears that the report of that case in *Dickens* is perfectly accurate. Lord *MacDonald* was served personally with a subpœna, at *Edinburgh*, on the 11th of May, 1779. He did not appear; but coming to *London* in November, 1780, an attachment was sued out against him, directed to the Sheriff of *Middlesex*, upon which he was arrested. On the 5th of December, 1780 (the first seal after Michaelmas Term), the Defendant moved to discharge the attach-

(1) 18 Ves. 496.

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ment for irregularity. Lord *Thurlow*, doubting whether an arrest upon an attachment sued out within the jurisdiction for non-appearance to a bill, on a subpœna served out of the jurisdiction, was maintainable, directed that the motion should be mentioned again. It was mentioned again on the 9th of December, 1780 (the second seal), when the notice was ordered to be saved until the 13th of December (the third seal). The motion was not mentioned again; but on the 15th of December, 1780, the Plaintiff obtained an order, on petition and affidavit, for leave to sue out a subpœna for the Defendant to appear and answer, returnable immediately, thereby, as it would seem, abandoning the prosecution of the attachment. The discharge of the Defendant from the attachment was, probably, effected by the Plaintiff giving notice to the sheriff to discharge him. No order was required for that purpose. The question of the regularity or irregularity of an attachment for want of an appearance on a subpœna served out of the jurisdiction, therefore, remained undecided. In *Scott* v. *Hough*, it appears, from the minute-book of the registrar, that Lord *Loughborough* granted the attachment on the 12th of February, 1793, on the motion of Mr. *Abbott*, but that no order was drawn up, and no order is entered. It is said, in *Shaw* v. *Lindsay*, that Lord *Eldon* granted the order. The only authority for this is the following entry in the minute-book of the registrar of the 10th of March, 1812 :—

> "*Shaw* v. } *Cooke* — moves that attachment with proclamations may issue."

This is literally all that appears. No order is said to have been made, and the motion is not struck through, which (I am informed) is usual where an order has been made; and no order is entered. I do not think that these cases, which were all cited in the argument, are authorities either for or against the practice as to service of a subpœna out of the jurisdiction of the Court. They certainly indicate some doubt, at least, as to whether an attachment ought to issue for a refusal to obey the process of the Court, served upon a party beyond the limits of its jurisdiction. The Master of the Rolls, in the case of *Cookney* v. *Anderson* (1), seems to give an

(1) 31 Beav. 468.

accurate description of the earlier practice. He says: "Before the Acts, the power of serving a subpœna on a Defendant abroad existed, but it was simply useless, because, unless the Defendant voluntarily appeared, no further steps could be taken against him." It was, as Lord *Cranworth* said in *Hope* v. *Hope* (1), "not that there was a want of jurisdiction, but a want of the power of enforcing it."

But it was argued that, if this power of serving a subpœna out of the jurisdiction existed before the statutes, it must have been absolute and unlimited, and so the Acts of Will. 4, giving the power in particular cases, would have been unnecessary. The observations just referred to are an answer to this argument. The service of a subpœna in a foreign country was altogether nugatory unless voluntarily obeyed. *Ireland* and *Scotland* were as much extra territorial, with respect to the jurisdiction of the English Courts, as any foreign country. The Acts of Will. 4 were therefore passed in order to make the subpœna from the Courts in *England* and *Ireland*, in suits of a particular description, effectual upon Defendants resident in or out of the *United Kingdom*. If the legislative provisions upon this subject had been confined to these Acts of Will. 4, the 33rd Order of May, 1845, could not have been made, or, at all events, it must have been limited in construction to the Defendants in suits mentioned in those Acts. But one of the Acts, in pursuance of which these orders are made, is the 3 & 4 Vict. c. 94, which is of much more extensive operation. It empowers orders to be made with respect to the process, pleadings, and course of proceeding, in the Court of Chancery, not only in certain specified particulars, but also in general and comprehensive terms. Amongst others, power is given to make alterations "generally in the form and mode of proceeding to obtain relief, and in the general practice of the Court in relation thereto." These words seem to me to be sufficiently large to authorize rules to be made for service upon parties anywhere out of the jurisdiction, without which, in many cases, relief would not be attainable. The learned Judges of the Court, who took part in framing and sanctioning the General Orders of May, 1845, must have been of this opinion; for, taking no notice of the Acts of Will. 4,

(1) 4 D. M. & G. 345.

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and expressly proceeding upon the authority of the 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, they framed the 33rd Order in the most general terms, and made it apply to "a Defendant in any suit out of the jurisdiction of the Court." It seems to me impossible to restrict these words to those suits to which alone the statutes of Will. 4 apply. Assuming, however, that the 3 & 4 Vict. c. 94, gave no power to make so large and comprehensive an order, yet, as the General Orders of May, 1845, including, of course, the 33rd Order, were, in pursuance of the 4 & 5 Vict. c. 52, laid before Parliament, and no resolution of either House was passed that "it ought not to continue in force"; by the express words of the Act it became "binding and obligatory on the Court, and of the like force and effect as if the provisions therein contained had been expressly enacted by Parliament." In *Whitmore* v. *Ryan* (1), Vice-Chancellor *Wigram* declined to give an opinion whether the Act of the 3 & 4 Vict. intended to give the Judges of the Court of Chancery power to make this 33rd Order. In my view, this question is quite immaterial, for the words of the 4 & 5 Vict. just mentioned could not have had their full effect unless they gave complete validity to this order.

The present question, however, does not depend upon the Order of May, 1845, but upon the 7th rule of the 10th of the Consolidated Orders. Lord *Westbury*, in *Foley* v. *Maillardet* (2), after stating that he found "no fault with the course taken by Vice-Chancellor *Wigram* in *Whitmore* v. *Ryan*, where he considered it incumbent upon him to obey the language of the Order of May, 1845"; observing that, "probably His Honour had no alternative," added, "but the construction of the corresponding rule of the Consolidated Orders, which is now in question, must be determined having regard to the preamble and the statute under which they were made;" and His Lordship arrived at the conclusion, that "the language of this rule was in excess of the parliamentary powers under which the Consolidated Orders were made." I cannot agree in this opinion. The 7th rule of the 10th of the Consolidated Orders is the exact counterpart of the 33rd Order of May, 1845, with a few slight variations, necessary to adapt it to the altered

(1) 4 Hare, 612. (2) 1 D. J. & S. 389.

practice of the Court, introduced by the 15 & 16 Vict. c. 86. The Order of May, 1845, having the force of a parliamentary enactment, had established the right to serve a subpœna upon Defendants who were out of the jurisdiction of the Court. When the writ of subpœna was abolished, and the service of a printed bill substituted, it became necessary to adapt the rules and orders of the Court to the new state of things. The 63rd section of the 15 & 16 Vict. c. 86, therefore empowered the Judges of the Court of Chancery from time to time to make general rules and orders for carrying the purposes of the Act into effect. Of course, it must be assumed to have been known to the Legislature that, as the subpœna was abolished, the order, which had received the sanction of Parliament, for the service of a subpœna out of the jurisdiction of the Court would become nugatory, and that a new order on the subject would be necessary. It is very difficult to understand, under these circumstances, how the slight alteration of the 33rd Order of May, 1845, made for the purpose of carrying the Act into effect, can be regarded "as in excess of the parliamentary powers under which the Consolidated Orders were made." I have already stated that, in my opinion, the proviso in the 64th section of the Act would not render valid any order which was in excess of these powers, merely because no resolution of either House of Parliament was passed that it ought not to continue in force. But the order in question appears to me to be "a compliance with, and not a transgression of, the parliamentary powers by virtue of which it was made;" and having taken effect as a general order, and having been laid before both Houses of Parliament, without any resolution against it, it has not, in the words of the Act, "ceased to be binding."

For these reasons, I think that Vice-Chancellor *Stuart* was right in declining to follow the decisions of Lord *Westbury*, upon which I have commented at some length,—that service of a bill out of the jurisdiction may be ordered by the Court under the 7th rule of the 10th of the Consolidated Orders, and that the appeal against the refusal of the Vice-Chancellor to discharge an order for such service must be dismissed. But the Lord Justice being of opinion that, out of respect for Lord Chancellor *Westbury's* decisions, the costs, both here and below, should be costs in the cause, I concur

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in that view, and agree to dispose of the question of costs in this manner.

SIR G. J. TURNER, L.J.:—

This is an appeal from an order of the Vice-Chancellor Sir *John Stuart*, by which His Honour refused an application on the part of the Defendant to discharge an order in the cause for the service upon him, out of the jurisdiction of the Court, of a printed copy of the bill. The bill which was thus directed to be served out of the jurisdiction of the Court seeks no relief in respect of any such matters as are referred to in the statute 2 & 3 Will. 4, c. 33, or in the statute 4 & 5 Will. 4, c. 82; and the order for service of the bill could not, therefore, be maintained under either of those statutes. It was not, however, suggested in argument—and I see no ground on which it could have been suggested—that the case does not fall within Rule 7, Order x., of the Consolidated Orders; and if, therefore, that rule be valid, it must follow that the order for service of the bill was properly made, and the motion to discharge it properly refused. The question, therefore, is, whether that rule is valid or not. The rule is founded on the 33rd of the General Orders of the 8th of May, 1845, and is identical with that order, except as to some alterations which were necessary to adapt it to the altered forms and practice of the Court. I shall presently advert to the question, whether the difference in terms between this rule and the 33rd Order at all affects the validity of the rule, but, before doing so, it will be convenient to consider whether the 33rd Order itself was valid, for if that order was invalid, there seems to be at least great reason to contend that the order founded upon it is invalid also.

This 33rd Order purports to have been made under the powers given by the statutes 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, and all other powers enabling in that behalf. There are, therefore, two points of view in which its validity may be considered. First, with reference to the general powers of the Court to regulate its practice; and secondly, with reference to the special powers given by the statutes referred to.

Looking at the question in the first point of view, it is material to consider how the practice of the Court stood at that time. It

stood, as I understand it, thus: That subpœnas could be and were served out of the jurisdiction of the Court, and that if the party served appeared to the suit in consequence of the service, the service was effectual, and the suit could proceed against the party, but that if the party served did not appear upon the subpœna, the service could not be made effectual, and the suit could not be proceeded in against the party served. There was at this time no such practice as that introduced by the Orders of the 8th of May, 1845, of entering an appearance for a Defendant at the instance of the Plaintiff. What has been stated by the Lord Chancellor, as to what appears in the registrar's books, with reference to the cases in 2 *Dickens*, 4 *Brown*, and 18 *Vesey*, which were referred to in the course of the argument, is, I think, sufficient to shew that at the time referred to the practice of the Court was such as I have stated above. Was it then competent to the Court, by force of its general powers, to alter this practice, and to render the service of a subpœna out of the jurisdiction of the Court effectual, either by authorizing an attachment to be issued in default of appearance, or by giving the Plaintiff the right to enter an appearance upon such default? I am disposed to think that it was not, for to have done so would have been not to alter the process of the Court, but to give an effect to the subpœna, the Queen's writ, which the writ, not being available beyond the jurisdiction, did not of itself possess. So far, therefore, as this order rested upon the general powers of the Court, I think it was of no avail, and the validity of the order must, therefore, depend upon the statutes.

We must consider then the effect of the statutes. The leading statute, 3 & 4 Vict. c. 94, as appears from the recital, was passed for the purpose of diminishing the delay and expense in suits in the Court, and, as also appears by the recital, it was intended to authorize alterations to be made, as to which it was doubtful whether they could be made without the authority of Parliament. The powers given by it to make alterations by general orders were most extensive. Amongst other things, the Lord Chancellor was empowered, with the advice and consent of the Master of the Rolls and Vice-Chancellor, or one of them, by general orders to make such alterations as might seem expedient in the form and mode of

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proceeding to obtain relief, and in the general practice of the Court in relation thereto, and also to make general rules and orders for carrying the alterations into effect; and these rules and orders were to be laid before Parliament, and, if not objected to within the time mentioned in the Act, were to be binding and obligatory upon the Court, and to be of like force and effect as if the provisions therein had been enacted by Parliament. The statute 4 & 5 Vict. c. 52, merely alters the mode of giving Parliamentary authority to the rules and orders. Now that the Orders of 1845, and especially the 33rd Order, altered the mode of proceeding, and the practice of the Court in relation thereto, cannot, as it seems to me, be denied, for by these orders, as already observed, the practice of the Plaintiff entering an appearance for the Defendant was introduced, and by the 33rd Order that practice was applied to the case of a Defendant out of the jurisdiction of the Court. These orders, therefore, including the 33rd Order, seem to me to fall within the words of the enacting part of the statute, and I take the general rule to be, that general words in the enacting part of a statute are not to be restrained by the recital: *Rex* v. *Athos* (1); *Copeman* v. *Gallant* (2). Even supposing, however, that the general words of the enacting part of this statute ought to be restrained by the recital, there was, as it appears to me, a sufficient foundation for the 33rd Order, for there can be no doubt that, according to the practice of the Court as it then stood, there was both delay and expense in the mode of obtaining relief, and in the practice of the Court in relation thereto, where a Defendant was out of the jurisdiction of the Court. The practice then was to name the absent party as a Defendant to the bill, and to pray process against him when he should come within the jurisdiction. If he came within the jurisdiction before issue joined, he was served with the process, and the suit was delayed in consequence. If he came within the jurisdiction after issue joined, a supplemental bill became necessary to bring him before the Court, and this, of course, was attended both with delay and expense. In any view of this case, therefore, it seems to me that this 33rd Order was well warranted by the statute. The question whether it was so or not is not altogether new to me, and it may

(1) 8 Mod. 144. (2) 1 P. Wms. 320.

be right, perhaps, that I should state the history of these Orders of 1845. Lord *Lyndhurst* was at the time Lord Chancellor, and he had, some time before the orders were made, requested Lord *Langdale*, then Master of the Rolls, to advise him as to the Orders to be made, calling to his aid such members of the bench or the bar as he might think fit. Lord *Langdale* then formed a committee, consisting of himself, Lord *Kingsdown* (then Mr. *Pemberton Leigh*), the Vice-Chancellor Sir *James Wigram*, and the late Mr. *Sutton Sharpe*, and upon his untimely death I became a member of the committee. It was by this committee these Orders were discussed, decided upon, and ultimately prepared, and it is within my personal recollection that in the course of the many discussions which were had upon them, the question whether the statute warranted the making of the 33rd Order was fully considered, and it was thought by all the committee that it did. The orders, when prepared, were adopted by Lord *Lyndhurst*, and by the Vice-Chancellor of *England*, and they were afterwards laid before Parliament, and not having been objected to within the prescribed period, acquired, to use the language of the statute, the like force and effect as if the provisions contained therein had been enacted by Parliament. These Orders, therefore, including the 33rd Order, are founded upon very high authority, in saying which I desire to be understood as not including myself, and not only so, but in *Whitmore* v. *Ryan* the 33rd Order was distinctly held, by the Vice-Chancellor *Wigram*, to apply generally in all cases, and not to be confined to cases falling within the statutes of Will. 4, and it is evident from what fell from Lord *Cottenham*, in *Blenkinsopp* v. *Blenkinsopp* (1), that the same view was taken by him. I may add that the same view was, so far as I am aware, taken and acted upon by every branch of the Court until the decision of Lord Chancellor *Westbury* in *Cookney* v. *Anderson* (2). In that case, however, and in the cases of *Foley* v. *Maillardet* (3), and *Samuel* v. *Rogers* (4), following upon it, and to be found in the same volume of Reports, Lord Chancellor *Westbury* decided that the 33rd Order only authorized service out of the jurisdiction in cases falling within the statutes of Will. 4, and, of course, his Lordship's

(1) 2 Ph. 1.
(2) 1 D. J. & S. 365: 9 Jur. N.S. 736
(3) 1 D. J. & S. 389: 10 Jur. N.S. 161.
(4) Ibid. 396.

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opinion, however much it may conflict with previous opinions and decisions, is entitled to the most grave and serious consideration, and cannot be lightly regarded.

The reasons on which these decisions proceed are to be found in the judgment in *Cookney* v. *Anderson,* and, speaking with the utmost respect, I feel bound to say that they do not satisfy my mind that the decisions are well founded. The question in this case, as I view it, is not against whom, or under what circumstances, or with relation to what property, the Legislature of a country may be justified in authorizing the process of its Courts to be served out of the jurisdiction of those Courts, but whether the Legislature of this country has not in fact authorized the process of this Court to be so served. It may well be that the arguments advanced in the judgment against the assumption of extra territorial jurisdiction, would disincline a Court of justice to suppose that the Legislature could have intended to give the power of assuming it, but in estimating the weight which may be due to this argument, it must be remembered that it was in the Judges of the Court the Legislature vested the power of determining in the first instance whether it should be assumed or not, and that the Legislature reserved to itself a veto upon their determination, which it did not think proper to exercise, and the non-exercise of which gave to their determination the sanction of Parliament. It must be remembered also to what length the Legislature had already gone in this direction, that it had already authorized service out of the jurisdiction, not only in suits relating to land, but in suits concerning government or public stock, or public shares in public companies or concerns, and it is further to be observed that this exercise of this power to serve out of the jurisdiction is, by the orders, left entirely in the discretion of the Court, and that if in consequence of these orders any decree be made against a person out of the jurisdiction, it would be for the Courts of the country in which he may reside to determine whether the decree should be enforced against him. Weighing these considerations against the judgment in *Cookney* v. *Anderson,* and the cases which followed it, and looking to the language of this statute, to the mischief which it was intended to remedy, to the high authority on which the orders made under it rest, and by which they have been recognised,

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and to their having been so long acted upon by all the Courts, my opinion is, that the 33rd of those Orders was, and is, valid and effectual.

Then as to the question whether the difference in terms between this 33rd Order and Order x., rule 7, of the Consolidated Orders, at all affects the validity of the rule, I have but a few words to say. I think that the service out of the jurisdiction having been well introduced into the practice of the Court under the authority of Parliament by the 33rd Order, there was full power in the Judges of the Court to adapt that practice to its existing course and form of procedure. What has been done by the Consolidated Orders is not an extension of the Act of Parliament, but merely an adaptation to the altered forms of the Court of the practice introduced under it.

My opinion therefore is, that this motion ought to be refused; but, having regard to the importance of the question, and out of respect to Lord Chancellor *Westbury's* decisions, I think that all the costs, both here and below, should be made costs in the cause. It may be right for me to add that I have reason to know that the late Lord Justice fully concurred in the opinion which we have expressed.

Solicitors for the Plaintiff: Messrs. *Williams & James.*
Solicitors for the Defendant: Messrs. *Burt & Stevens.*

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Extradition—6 & 7 *Vict. c.* 75—29 & 30 *Vict. c.* 121—*Warrant*—*Evidence*—*Condemnation par Contumace.*

Copies of depositions taken before the passing of the Act 29 & 30 Vict. c. 121, if authenticated as required by the Act, may be received in evidence in proceedings under the Extradition Acts.

The original depositions, properly authenticated, can be received in evidence against the prisoner.

A French warrant for the apprehension of an accused person is necessary in order to procure his extradition under 6 & 7 Vict. c. 75, but it need not be signed by a Judge or competent magistrate, and need only be authenticated as

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made in such manner as would justify the arrest of the accused person in *France*.

A person condemned *par contumace* in *France* continues to be an accused person, liable to be delivered over under the Extradition Acts.

THE prisoner in this case was a French notary, named *Paul Charles Emile Coppin*, alias *Dubois*, who had been committed to prison on the 13th of September, by Mr. *Vaughan*, a police magistrate, under the Acts for the extradition of criminals: 6 & 7 Vict. c. 75, 8 & 9 Vict. c. 120, and 29 & 30 Vict. c. 121. The Lord Chancellor had granted a writ of *habeas*, and the matter now came on for argument on the return to the writ.

The evidence on which the prisoner was committed appeared to be, first, proof by witnesses of his identity; secondly, a copy of the *arrêt de mise en accusation*, which was an order made on the 1st of May, 1863, by the *Cour Impériale* at *Paris*, stating several charges of forgery and fraud as sufficiently established against *Coppin* in his absence, and finally referring the matter to the *Cour d'Assises* of the department of *Yonne*, and ordering *Coppin* to be taken and conducted to the prison of the department of *Yonne*. The *arrêt* purported to be signed by several of the Judges, and the copy produced was signed by *Fauche* the greffier, and had the seal of the *Cour Impériale*, and also the seal of the Minister of Justice, which purported to have been affixed on the 29th of June, 1866, and to "*légaliser*," or authenticate, the signature of *Fauche*; thirdly, the original depositions taken in *France* on the charge of forgery, signed by the magistrate who took them, whose signature was "*légalisé*," or authenticated, by the seal of the Minister of Justice. The *arrêt* appeared to have been made on production of these depositions, which were not taken before the Court in *Paris*. It appeared on cross-examination of the witnesses that the prisoner had been condemned in his absence, or "*par contumace*," and evidence was given by an expert as to the effect of this condemnation.

Mr. *Edward Clarke*, for the prisoner:—

First, the depositions having been taken, and the *arrêt* or warrant granted, in 1863, are not admissible in evidence under 29 & 30 Vict. c. 121, without proof, although the copy be authen-

ticated in the manner provided by that Act; secondly, the warrant produced is not signed by any Judge at all, though it purports to be a copy of a signed *arrêt*, and the depositions are not signed by the same Judge, or properly authenticated, as required by the Act 6 & 7 Vict. c. 75, or 29 & 30 Vict. c. 121; thirdly, there is no proof of forgery, only of uttering a forged document; fourthly, the man is not within the Act at all, as he is not an accused person, having been condemned *par contumace*. That is in evidence, but we have not been able to obtain the official record of the fact. This government has refused to deliver up condemned persons to *France*, and the distinction appears from the Act relating to *Denmark*, 25 & 26 Vict. c. 70.

The *Attorney-General* (Sir *John Rolt*), the *Solicitor-General* (Sir *W. Bovill*), and Mr. *Hannen*, for the Secretary of State, who had been served with the writ:—

By the French law, a *condamnation par contumace* is only a sort of process to compel appearance, and is at an end when the accused person appears. As to the evidence in this case, we have no copies at all but the original depositions, which must be evidence, and we have no occasion to go into the question of copies. Then as to the signature of the warrant. The provision as to signature relates only to copies of depositions. This is on the face of it a good warrant; it shews what he was accused of, and that he is to be arrested, and it is properly certified. There is no other warrant according to the practice in *France* than this, which is like an office copy of an order in *England*.

Mr. *E. Clarke*, in reply:—

As to the condemnation *par contumace*, it may be true that if the man surrenders within twenty years, he is put upon his trial just as if he had not been condemned; but still he has incurred a penalty, and is not in the same position. By Art. 476 of the *Code d'Instruction Criminelle*, if he does not surrender within a certain time, the judgment remains valid as to his goods, and by the same article, if he does not surrender for five years he will have to pay costs; moreover, by Art. 477, written evidence is admitted against him. All this has changed his status, and he is

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no longer an accused person within the meaning of the Act. Then as to the depositions; they must be signed according to the Act, and must be authenticated, whether originals or copies, and cannot be received without: 6 & 7 Vict. c. 75, s. 3. Moreover the copy of the *arrêt* which is called the warrant is not signed by any Judge, but only by *Fauche* the greffier, which is not at all a compliance with the Act.

[THE LORD CHANCELLOR.—The provision as to signature can only apply where the warrant is to be signed. How do we know that a warrant in *France* requires signature? This document purports to be a warrant, and has the seal of the *Cour Impériale*, and also of the Minister of Justice. If this is not a sufficient warrant, I do not know what would be. I think that in proceedings under these Acts sufficient respect has not been paid to these documents.]

Still when the Act under which the whole proceeding takes place points clearly to a signature, the Court must require a signature.

The late Act points out how everything is to be proved, and how evidence is to be given, and how copies are to be made evidence; but the original depositions are not made evidence at all. The ordinary plan would be to produce the witnesses, but as that would be inconvenient these copies are made evidence, but the Act goes no further, and the original depositions are nowhere made evidence.

LORD CHELMSFORD, L.C.:—

I granted this *habeas corpus* during the vacation, and made it returnable on the first day of Term, in order that the objections which were made to the delivery up of the prisoner to the French Government might be publicly argued and determined.

In considering the objections which have been raised, I am bound to adhere strictly to the provisions of the Acts of Parliament relating to the French extradition treaties, and to determine from them, and them only, whether the detention of the prisoner is lawful; in other words, whether the police magistrate had power to commit the prisoner to gaol, there to remain until

delivered up to some person duly authorized to receive him and convey him to *France*.

The Act of 6 & 7 Vict. c. 75, is still the governing Act upon the extradition treaty with *France*. But the Act of last session altered the provisions of the former Act with respect to the mode of authenticating the depositions against the person accused, and made the requisite evidence exactly what the Legislature had already decided it should be with respect to documents of foreign Courts of justice produced upon a trial in any of our own Courts.

Four objections were made to the detention of the prisoner. The first, which was disposed of in the course of the argument, was, that the depositions were not properly authenticated because they were taken four years before the Act of last session, and therefore at a time when proof of a different kind than that which has been given would have been necessary. The observation which I made at the time this objection was stated, I can only repeat in answer to it. It is quite immaterial when the depositions were made if they are properly authenticated as required by law. Suppose the prisoner had fled to some country with which *France* had no extradition treaty, and, after some time, had been traced into *England*, he would surely have been in the condition of an accused person, and it could not have been necessary to have the depositions re-sworn in *France* before his delivery up could be demanded. If not, then the date of the depositions must be immaterial, and the only question under the Acts will be whether they are properly authenticated, which must be determined by the existing law.

The next objection was, that the depositions were not admissible in evidence, because no warrant of arrest or other equivalent document was signed by a Judge, or other competent magistrate, who also signed the depositions. This objection appears to me to have arisen from some misapprehension of the provisions of the statutes. The 2nd section of 6 & 7 Vict. c. 75, which is permissive only, allows copies of the depositions on which the original warrant was granted to be produced in evidence, and in such cases the copies must be certified under the hand of the person issuing the warrant. But, in this case, the original depositions themselves have been sent over from *France*, and therefore all the provisions in this Act,

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and in the Act of last session, as to the signature of copies, are wholly inapplicable. But it was said that the warrant of arrest, or other equivalent judicial document (which must always be produced), must bear the signature of a Judge or competent magistrate in *France*. All that is required, however, under 6 & 7 Vict. c. 75, is, that such warrant, or equivalent document, should be authenticated as made in such manner as would justify the arrest of the supposed offender in *France* upon the same charge, and that the acts charged against the supposed offender should appear to the justice of the peace (by the 8 & 9 Vict. c. 120, the police magistrate) to be clearly set forth in such warrant of arrest, or other equivalent judicial document. The document which has been called "*mise en accusation*," and is described on the face of it as "*Arrêt qui renvoie Coppin (absent) aux assises de l'Yonne*," must be taken to be equivalent at least to a warrant of arrest, if not identical with such a warrant. For, after reciting various crimes and offences with which the prisoner was charged, it goes on in these terms: "*Paul Emile Charles Coppin sera pris au corps, conduit dans la Maison de Justice près la Cour d'Assises du département de l'Yonne, et écroué sur les registres de la dite Maison.*"

This is an Act of the *Cour Impériale de Paris*, authenticated by the seal of the Court, and also by the seal of the Minister of Justice in *France*, and it contains a variety of charges of forgery of the most specific description. Therefore this *arrêt* is not only sufficiently authenticated to have justified the arrest of *Coppin* in *France*, but the acts charged are also set forth in it so as clearly to appear to the magistrate to whom it was produced. The original depositions are all of them sealed, like the *arrêt*, with the seal of the Minister of Justice. Every condition required by the Acts has been fully complied with in respect of all the documents in evidence before the police magistrate to support the requisition for the delivery up of *Coppin*.

The third objection was, that *Coppin* was charged, not with forgery, but with having uttered a forged document, which, it was argued, was not an offence included within the treaty and the Act of Parliament. [His Lordship then read the evidence, and came to the conclusion that it would be a hopeless task to contend that

the magistrate would not have been justified in sending the prisoner to trial for forgery if the offence had been committed in this country.]

The fourth, and last objection, was, that *Coppin* had ceased to be an accused person because he had been already condemned in *France* for the offence of which he was charged, and it was contended that I was bound to accept the fact of his condemnation without looking to the nature of the proceeding upon which it was founded. When this argument was first addressed to me, I was under the impression that there would be found amongst the documents a formal judgment against the prisoner. But it appears that there is no other proof of this alleged judgment than the deposition of a witness that there was no trial because the prisoner left, and that he was judged *par contumace*. This, of course, is no proper, or even admissible, evidence of a foreign judgment, and the objection might have been disposed of at once upon this ground; but so much misapprehension seems to prevail as to the effect of a judgment *par contumace* in *France*, with reference especially to the extradition treaty, that I thought it desirable, notwithstanding the imperfect evidence, to permit the question to be argued.

This being a question of foreign law, it was necessary that there should be evidence given to the magistrate by some person skilled in that law as to the nature and effect of such a judgment. Accordingly a French advocate, M. *Eugène Rasul*, deposed as follows: —"If a man is accused of forgery in *France*, and a judgment *par contumace* is obtained against him, it would be a sentence of the Court without the assistance of a jury. If that man is arrested or surrenders himself, that judgment is annulled, so that it is exactly the same as if no proceedings had been taken against him, and then he undergoes his trial for the offence with which he was charged." Without this evidence it would have been impossible for the magistrate to have any competent knowledge upon the subject, for, as Lord *Brougham* said, in the *Sussex Peerage Case* (1), the Judge has not organs to know and to deal with the text of the foreign law, and therefore requires the assistance of a foreign lawyer who knows how to interpret it. But having this assistance,

(1) 11 Cl. & F. 115.

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and being referred by M. *Rasul* to the *Code Napoléon,* we may venture to look into the text, and to the Article 476 of the *Code d'Instruction Criminelle,* upon which he founds his opinion, which is in these terms:—"*Si l'accusé se constitue prisonnier ou s'il est arrêté avant que la peine soit éteinte par prescription, le jugement rendu par contumace et les procédures faites contre lui depuis l'ordonnance de prise de corps ou de se représenter, seront anéantis de plein droit et il sera procédé à son égard dans la forme ordinaire.*" It will be observed that this article commences by calling the alleged offender, after a judgment *par contumace,* the accused, and not the condemned. And as upon his appearance, or upon his apprehension, the judgment against him is annulled, and he is to be put upon his trial for the offence, I do not see how he can be described otherwise than as an accused person. But it is said that the judgment *par contumace* places the party who afterwards surrenders himself, or is apprehended and brought before the Court, in a less favourable position upon the trial which ensues: and Articles 518 and 519 of the *Code d'Instruction Criminelle* were referred to, to establish this assertion. I might perhaps refuse to look at these articles without a skilled interpreter, but I am so anxious that the case should be thoroughly investigated, that I am disposed to yield to this further irregularity in the proceedings. It appears to me that the object and effect of these articles have been entirely misunderstood. The title of the chapter under which they are ranged is, "*De la Reconnaissance de l'identité des individus condamnés évadés et repris;*" and Article 518 is to this effect: "*La reconnaissance de l'identité d'un individu condamné évadé et repris sera faite par la Cour qui aura prononcé sa condamnation.*" It merely provides for establishing the identity of the party before he is sent to his trial. And in a note to this article in one edition of the Code, it is said: "*Au reste cette identité reconnue, comme l'arrêt de condamnation se trouve anéanti de plein droit, l'accusé devrait être soumis à de nouveaux débats devant les jurés.*" The 519th Article merely provides that all the judgments with regard to the identification of an accused party shall be without the assistance of a jury.

It does not appear, therefore, that the trial of a person condemned *par contumace* differs at all from that of a party who is

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put upon his trial without any previous condemnation. But, if, in order that no part of the argument for the prisoner may be disregarded, I should assume that it has been established that the judgment *par contumace* does work some prejudice to the party upon the trial, either by reducing the amount of necessary proof, or by changing its character, or by making him liable to costs, how could that possibly take him out of the category of accused persons? He has ceased to be a person condemned, because his condemnation is annulled upon his appearance, and he is to take his trial for offences with which he stands charged. What better, I ought rather to say what other, description of him could be given than that of a person accused?

I have not, at any period of the argument, entertained the slightest doubt as to the invalidity of all the objections, but I was anxious that the subject should be fully discussed, in order that it might be publicly known that the delivery up of the prisoner to *France* was in strict accordance with law and the correct interpretation of the Treaty and of the Acts for giving effect to it. The question has been fully argued, and I am of opinion that no case has been made out for the discharge of the prisoner, and that he must be remanded.

Solicitor for the Prisoner: Mr. *A. Dixon.*
Solicitor for the Secretary of State: *The Solicitor to the Treasury.*

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L. C. 1866 *Nov.* 24, 26; *Dec.* 4, 13, 14, 17.

Setting aside Sale—Fiduciary Relation—Concealment.

T., a young man aged twenty-three, entitled to a moiety of a freehold estate the entirety of which brought in about £440 a year, being pressed for payment of his college debts, amounting to about £1000, and being estranged from his father, wrote to his great uncle for advice and assistance as to payment of the debts. The uncle deputed the Defendant, his nephew, to see *T.* on the subject. The Defendant met *T.* by appointment, and at this interview *T.* refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the Defendant offered him £7000 for it, payable by instalments. *T.* next day accepted the offer. Before an agreement had been signed, the Defendant obtained a valuation by

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a surveyor estimating the value of the mines under the entirety at £20,000. The sale was completed without this valuation having ever been communicated to *T.* *T.*'s heir filed a bill to impeach the sale :—

Held, affirming the decree of *Wood*, V.C., that the Defendant had stood in a fiduciary relation to *T.*, which made it his duty to communicate to *T.* all material information which he acquired affecting the value of the property, and that, as he had not communicated the valuation to *T.*, the transaction must be set aside.

12 Eq. 222
16 Eq. 53.
33 L.J. Ch. 308

THIS was an appeal by the Defendant *Robert Williamson* from a decree of Vice-Chancellor *Wood* setting aside a sale, on the ground that the purchaser stood in a fiduciary relation to the vendor and did not make a full disclosure to him of all material facts within his knowledge relating to the value of the property. The facts of the case fully appear in the report of the case before the Vice-Chancellor (1), and the judgment of the Lord Chancellor.

Mr. *W. M. James*, Q.C., and Mr. *Little*, in support of the decree :—

The case may be regarded in two aspects, and first we take the case of *Robert Williamson*, supposing *Hugh Williamson* not connected in any way with the purchaser. *Hugh Williamson*, having been asked by the intestate for assistance and advice as to the payment of his debts, and being unable, owing to ill health, to attend to the matter in person, deputed *Robert Williamson* to do so, and *Robert Williamson* undertook to see how the intestate's liabilities could be discharged. This clearly created a fiduciary relation, and placed *Robert Williamson* in a higher position of confidence than that of a solicitor, who usually only advises as to questions of law. The doctrine of the Court as to dealings with a person in a fiduciary position is not confined to dealings between trustee and *cestui que trust*. Its extent may be collected from *Gibson* v. *Jeyes* (2); *Molony* v. *Kernan* (3); and *Rossiter* v. *Walsh* (4); though these are only instances of its application, and do not furnish its limits. *Robert Williamson* visits the young man, and a contract for sale is forthwith entered into, the young man having no friend or adviser. We know nothing of what passed between them, except from *Robert Williamson's* own account, and it is not to be relied on, the onus

(1) Law Rep. 1 Eq. 528.
(2) 6 Ves. 266.
(3) 2 D. & War. 31.
(4) 4 Ibid. 485.

being on him to justify a purchase entered into in such circumstances. *Wedlake* having very properly refused to draw up the agreement unless the intestate had independent advice, *Robert Williamson* recommended him to apply to his father, which he knew that he would not do, and then referred him to *Payne*, who does not appear to have known anything about the property; nor, indeed, to have been consulted as to the propriety of the bargain. But the decisive fact is, that before any binding agreement had been entered into, *Robert Williamson* obtained *Cope's* valuation of the minerals, but allowed the transaction to proceed without ever communicating it. After this suppression of a circumstance so materially affecting the price to be asked, the transaction cannot stand. If a stranger had made an offer to the intestate for the property it would have been *Robert Williamson's* duty to communicate to the intestate this valuation, and it was not the less so when he bid for it himself. If an agent buys from his principal, suppressing such a fact, the contract is voidable without proof of undervalue: *Murphy* v. *O'Shea* (1). But the evidence upon the whole shews that the price was grossly below the real value. Then, moreover, there were misrepresentations as to the mines in the letter of the 10th of September, 1859, and though an ordinary purchaser is not bound to disclose his knowledge to the vendor, he must not say anything to mislead him: *Turner* v. *Harvey* (2), and the recommending the person to whom the misstatement is made to take advice, does not alter its effect: *Reynell* v. *Sprye* (3).

As regards *H. H. Williamson*, there is every reason to believe that he was the real purchaser. The property was bought with his money, and in letters which passed soon after the transaction, he was spoken of as the owner, and, down to the disclaimer, there was nothing to rebut the presumption that he was the purchaser. Now a purchase by him, who had practically been the intestate's guardian within so very short a period from this transaction, would stand in no better position than one by a solicitor from his client.

The *Attorney-General* (Sir *J. Rolt*), and Mr. *Bristowe*, for the Appellant:—

The jurisdiction of the Court of Chancery in cases of this

(1) 2 J. & Lat. 422. (2) Jac. 169. (3) 1 D. M. & G. 660.

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nature rests on the principle of correcting the abuse of influence founded on confidence. The jurisdiction, however, does not apply in all cases of confidence, *e.g.*, the confidence which a man may have in a friend. It is difficult to define its extent, but we say that it can be applied only where some relation exists, which is recognised as imposing on the more influential party some special duty, legal or moral, towards the other. The relation must be one which, according to the expression of Lord *Eldon*, in *Huguenin* v. *Baseley* (1), makes it the duty of one party to take care of the other. If such a relation exists, the trusted party must give the other all due protection, and disclose all that he has learnt through the confidential relation, but it is new to say that he is bound to disclose all that he has learnt at his own expense, and not by virtue of the fiduciary relation. Care must be taken not to extend the application of the principle beyond its proper limits: *Harrison* v. *Guest* (2). *Billage* v. *Southee* (3) lays down the rule in broad terms, but the expressions there require some qualification. In *Fox* v. *Mackreth* (4), a case much referred to by Lord *Eldon*, and discussed by him in *Ex parte Lacey* (5), *Mackreth*, who was a trustee for sale, had obtained information in that character and not communicated it, and *Ex parte Bennett* (6), *Coles* v. *Trecothick* (7), and *Lowther* v. *Lowther* (8), all go on the same ground. In *Molony* v. *Kernan* (9), the agent suppressed information obtained in the course of his employment as such. *Rossiter* v. *Walsh* (10) was, in fact, the case of an agent selling to himself. In *Murphy* v. *O'Shea* (11) the agent bought in the name of another person, which was a badge of fraud. There is no case impeaching the position, for which we contend, that a person may buy from one towards whom he stands in a fiduciary position, provided the transaction be fair and open, and there be a full disclosure of everything material that has been learnt through the fiduciary position. But here we contend that, when the contract was entered into, no such fiduciary relation existed as could affect the case. *Hugh Williamson* had been trustee for the

(1) 14 Ves. 273, 300.
(2) 6 D. M. & G. 424; 8 H. L. C. 481.
(3) 9 Hare, 534.
(4) 2 Bro. C. C. 400; 2 Cox. 320.
(5) 6 Ves. 625.
(6) 10 Ves. 381, 394.
(7) 9 Ves. 234, 246.
(8) 13 Ves. 95.
(9) 2 D. & War. 31.
(10) 4 Ibid. 485.
(11) 2 J. & Lat. 422.

young man, but there was nothing like the relation of guardian and ward. The young man had lived with his father, his natural guardian. When he came of age there was a settlement of affairs, and the only relation which existed was, that *Hugh Williamson*, having in him the legal estate of one moiety, received the rents of the whole and paid him a moiety. *Robert Williamson* only received the rents once or twice at the rent-day dinner, which he attended instead of his uncle, and could not gain by this means any information about the property. There was, then, no fiduciary relation in July, 1859. We say that the coming down to advise the intestate as to compromising with his creditors, did not create such a relation—a relation creating a recognised duty from one towards the other. But suppose a duty undertaken, it was only the duty of advising him as to negotiating for the reduction of his debts, and this came to an end when he positively refused to try to get them reduced, and determined to sell his estate and pay them himself. But supposing a fiduciary relation to exist, still *Robert Williamson* was at liberty to buy if he put himself at arms' length: *Chambers* v. *Betty* (1); and what could he have done more than he did to put himself there? The intestate was told to get independent advice. He then employed an independent solicitor, and if he was not properly advised, that was no fault of *Robert Williamson's*. The letter of the 10th of September is unjustly found fault with. Every statement in it is strictly correct, and a buyer is perfectly at liberty to enlarge upon the disadvantages to which the property is subject. As to *Cope's* valuation, *Robert Williamson* never knew of it until the relation of vendor and purchaser had been substituted for the fiduciary relation, if any such ever subsisted. As to value, no doubt the bargain has turned out rather a good one for the purchaser, but not outrageously good. In considering the evidence as to the value of the mines, it must be borne in mind that an undivided share in minerals is very awkward to deal with, and a mineral property of moderate extent can hardly be partitioned to any useful purpose, so that the value of the undivided share bears a much lower proportion to that of the whole than in the case of surface land.

(1) Beat. 488.

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Mr. *W. M. James*, in reply :—

The general principle as to fiduciary relation is well laid down in *Billage* v. *Southee* (1). The Court does not define what constitutes such a relation. The cases to which the principle has been applied are only instances. It applies wherever a relation exists which puts one party in the power of the other. There is neither principle nor authority in favour of the Appellant's contention that the application of the rule depends solely upon whether the party trusted has gained knowledge through his fiduciary position. It depends also on influence independently of information : *Edwards* v. *Meyrick* (2). But even if it rested on superior knowledge alone, it is absurd to say that such knowledge must be gained in the fiduciary relation. If I employ an agent to sell an estate, and he, just before I consult him, learns *aliunde* some hidden circumstance which materially enhances its value, is he not bound to give me the benefit of such knowledge, though not acquired by virtue of his agency? The letter of the 26th of August, the negotiation for purchase, and the suppression of *Cope's* valuation, as the Vice-Chancellor considered, dispose of the case.

Dec. 17. LORD CHELMSFORD, L.C. :—

In this case the Vice-Chancellor has made a decree that an agreement for the sale by the intestate, *William Clowes Tate*, to the Defendant, *Robert Williamson*, of the undivided moiety of an estate called the *Whitfield* estate, in the county of *Stafford*, consisting of messuages, lands, and coal mines, ought to be set aside, upon the ground of the Defendant not having communicated to the intestate all the information which he had acquired with reference to the value of the property, and, in particular, of his not having communicated an estimate of the value of the mines which was obtained by the Defendant pending the agreement.

The question raised by the appeal is whether any such relation existed between the Defendant and the intestate, as to render it the duty of the Defendant to make the communication.

The jurisdiction exercised by Courts of equity over the dealings

(1) 9 Hare, 534, 540. (2) 2 Hare, 60.

of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Did, then, the Defendant, *R. Williamson*, when he put himself in communication with the intestate, clothe himself with a character which brought him within the range of the principle?

In considering this question it will be necessary to bear in mind the situation of both the parties at the time when the agreement for the sale of the property was entered into.

The intestate, when he was quite an infant, had become possessed of the property in question independently of his father. He contracted habits of extravagance at the university, and in consequence of some displeasure which he had occasioned to his father on the subject of his debts, the father's doors were closed against him. He was thus thrown upon the world at an early age without any one to control him, and with scarcely a friend to counsel him, and towards the close of his life he became addicted to drinking, and died prematurely at the age of twenty-four. The Defendant is the nephew of Mr. *Hugh Henshaw Williamson*, the great uncle by marriage of the intestate, who had been the trustee and manager of the property, and receiver of the rents, which latter duty the Defendant had for some short time been deputed to perform for him. It does not appear that the Defendant by this employment acquired any particular information respecting the property, but as he states in his answer that he had "previously" (to his first interview with the intestate) "some idea of endeavouring to be the purchaser of the estate, in case the same should come into the

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market," it is reasonable to suppose that he was not altogether ignorant of its character, and must have formed some idea of its value.

I think no stress can be laid upon the circumstance of Mr. *H. H. Williamson* having been the trustee of the property. The trusteeship, as to the intestate's moiety, had come to an end upon his attaining his majority, in July, 1857. The accounts had been settled, and Mr. *Williamson*, in surrendering his trust, had behaved generously to the intestate. Though he continued after this period to receive the rents and manage the property, yet there appears to have been nothing in the office which he undertook after his trusteeship expired which would have prevented his dealing with the intestate upon the same terms as a mere stranger. Much less could the mere receipt of the rents for his uncle have placed *Robert Williamson* in a different position from that of any ordinary purchaser. But a new and peculiar relation arose out of the circumstances which afterwards occurred. In the year 1859, the debts which the intestate owed at the university were causing him considerable embarrassment. He had been pressed by Mr. *Holloway*, acting for his *Oxford* creditors, for payment of an amount of £1000. He was unable, in consequence of the unfortunate quarrel with his father, to apply to him for advice, and having before experienced the kindness of Mr. *H. H. Williamson*, he turned to him again in his difficulties. The letter by which the intestate made his situation known to Mr. *Williamson* is not forthcoming. The Defendant, in his answer, says that he was informed by Mr. *H. H. Williamson* that it stated he was again involved, and either asked for assistance, or for advice as to the mode of procuring assistance. I should have been glad if we could have seen the terms of this letter, as it might have explained the exact nature of the office which Mr. *Williamson* was asked to undertake. In the answer to this letter, dated the 30th of July, 1859, which is set out in the bill, in paragraph fifty-two, Mr. *Williamson* invited the intestate to his house, and desired him to bring with him "a correct account of his debts, omitting nothing, and he would see what could be done." The intestate did not accept the invitation, and nothing more was heard of the matter until about the 26th of August following, when Mr. *H. H. Williamson*

received a list of the intestate's debts due to *Oxford* creditors, amounting, as already mentioned, to £1000. The Defendant, in his answer, says "that the list was given to him by Mr. *H. H. Williamson*, and that he, after perusing the same, remarked that the charges were excessive, and that the bills might probably be settled for half the amount; that Mr. *H. H. Williamson* thereupon requested him to see the intestate, and ascertain upon what terms he could be relieved from his debts, and if this could be done for £500 or a little more, he authorized the Defendant to advance the intestate that amount on further security of the property." The Defendant accordingly wrote to the intestate on the 26th of August, 1859, the letter, which is set out in paragraph fifty-eight of the bill, in which he states that his uncle is not sufficiently well to attend to business; that the list of debts owing forms a very heavy amount, which Mr. *Holloway* expects to have paid immediately; and adds, "I will meet you in the course of a few days in *London*, upon having a couple of days' notice, and, after hearing your views on the subject, will talk over the matter, and see in what way it can be arranged." The counsel for the Defendant say that his office was merely to see whether a compromise of the debts could be effected, and that, at the time of the purchase, his mission was at an end. One can hardly believe that his advice and assistance could have been understood to be of this limited character. He knew that Mr. *Holloway* was pressing for immediate payment to the *Oxford* creditors, and that if he refused to reduce the amount the whole must be paid. It does not appear that if Mr. *Holloway* had insisted on a payment in full, that Mr. *H. H. Williamson* would not have been disposed to advance a larger sum than that which he had mentioned, as the property would have been an ample security for any amount required to cover the whole of the debts. And the Defendant must have been perfectly aware that the intestate's property in *Staffordshire* was the only fund out of which the debts could be discharged.

The account of the Defendant's interview with the intestate we have from the answer alone. He states that he offered to negotiate with the intestate's creditors for an abatement of their claims, telling him "that he was authorized by his uncle to advance £500 or more if required" (I suppose he must have added "upon the

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security of the property"), "but that the intestate positively refused to allow him to ask for any deduction from his debts, saying that any such application would injure his character." The answer then proceeds, "but he at the same time stated that he was desirous to sell his share of the *Whitfield* estate." Mr. *Bristowe*, for the Defendant, said the instant the intestate refused to allow any attempt to compromise his debts, the Defendant's office of adviser came to an end, and from that moment the parties, to use the familiar expression, were dealing "at arms' length." I cannot accept this view of the Defendant's position. I think that his visit to *London* was not solely for the compromise, but generally for the arrangement of the intestate's debts—that he came with authority which involved a dealing with the property of the intestate, as he was to advance his uncle's money on the security of this property. And it may be observed that he had his attention particularly directed to the mode of satisfying the debts by a mortgage. He knew, too, that if the payment of the debts in full was insisted upon, and his uncle refused to advance a larger sum than "£500 or a little more," a sufficient amount to discharge all the debts could easily be raised upon the security of the property, which was subject only to a mortgage for £1000. It seems to me that the Defendant had placed himself in a position which rendered it incumbent upon him to give the best advice to the intestate how to relieve himself from his debts, and no one can doubt that if his judgment had been unbiased that he would have recommended a mortgage and not a sale. But it appears, from the Defendant's own statement, that he had a reason for not giving this advice. As already stated, he had previously thought of purchasing the estate in case it should come into the market for sale, "an event," he says, "he thought was not unlikely to happen." I asked the Defendant's counsel what he understood by these words, and was answered, that the Defendant's expectation was founded upon the inconvenient nature of property consisting of an undivided moiety. This may have first led the Defendant to expect that he might have an opportunity of purchasing the property at no distant period, but his belief in the probability of a sale must have been considerably strengthened at the time of his interview with the intestate, from the knowledge he had of his embarrassments.

Whether the conversation between the Defendant and the intestate turned so abruptly from the intestate's refusal to compromise his debts, to the expression of his desire to sell his share of the *Whitfield* estate, as represented by the Defendant, or not, it is quite clear to my mind that the confidential relation between the parties had not terminated when the negotiation for the purchase of the property by the Defendant commenced, and that he did not then, or at any time afterwards, stand in the situation of an ordinary purchaser.

This being so, the Defendant, pending the agreement, was bound to communicate all the information he acquired, which it was material for the intestate to know in order to enable him to judge of the value of his property. It was admitted that the valuation of Mr. *Cope* was in the hands of the Defendant at the time he wrote his letter of the 10th September, 1859. The Defendant is charged with making untrue representations in that letter. If he had done so, it would of course strengthen the case against him, but I find nothing in the letter which amounts to a misrepresentation, nor anything more than a disparagement of the property, not uncommon with a purchaser when he desires to stimulate the owner of the property to close with his offer.

Having stated my opinion with regard to the duty cast upon the Defendant to communicate *Cope's* valuation to the intestate, it seems unnecessary to pursue the case further. The fair dealing, in other respects, of the Defendant during the negotiation, and before the agreement was signed, becomes almost irrelevant. The refusal of the solicitors to proceed with the agreement unless the young man had some legal assistance, the recommendation of the Defendant that the intestate should apply to his father for advice, the opportunity afforded him pending the negotiation of consulting any friends who were capable of advising him, the reference to Mr. *Payne*, whether merely for the purpose of completing the agreement, or to afford the intestate an opportunity of obtaining his opinion as to the value, all these considerations are of no consequence, when once it is established that there was a concealment of a material fact, which the Defendant was bound to disclose.

Nor, after this, is it of any importance to ascertain the real value of the property.

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Even if the Defendant could have shewn that the price which he gave was a fair one, this would not alter the case against him. The Plaintiff, who seeks to set aside the sale, would have a right to say, "You had the means of forming a judgment of the value of the property in your possession, you were bound, by your duty to the person with whom you were dealing, to afford him the same opportunity which you had obtained of determining the sufficiency of the price which you offered; you have failed in that duty, and the sale cannot stand." But, in truth, there are strong grounds for thinking that the price agreed to be paid by the Defendant is quite inadequate to the value of the property. There is no occasion to weigh the opposite opinion of the engineers and surveyors, and to form a conclusion from them. It is sufficient to take the valuation of the mines by *Cope*, amounting to £20,000, and the valuation of the surface by the Defendant's own witnesses, ranging from £10,000 to £11,290, and making every allowance for a reduction of the value of the intestate's share, in consequence of its being an undivided moiety, it will appear that the value, by the Defendant's own shewing, must have been at the least £14,000. For this property the Defendant agreed to pay £7,000, apparently about half the value, and that not at once, but £1,500 was to be advanced to the intestate, which was to bear interest till the day for the completion of the purchase, which advance must have been intended to enable the intestate to pay off his debts immediately; £2,000 was to be paid on the 25th March, 1860, and the residue by yearly instalments in the four following years.

It appears to me, upon a careful review of the whole case, that it would be contrary to the principles upon which equity proceeds, in judging of the dealings of persons in a fiduciary relation, to allow the purchase by the Defendant, *Robert Williamson*, to stand.

I am satisfied that the Defendant had placed himself in such a relation of confidence, by his undertaking the office of arranging the intestate's debts by means of a mortgage of his property, as prevented him from becoming a purchaser of that property without the fullest communication of all material information which he had obtained as to its value; that this openness and fair dealing were the more necessary when he was negotiating with an extravagant and necessitous young man, deprived at the time of all other advice,

eager to raise money, and apparently careless in what manner it was obtained; and the Defendant having, by concealment of a valuation which he had privately obtained, procured a considerable advantage in the price which the seller was induced to take, and which even the Defendant's witnesses prove to be grossly inadequate, he cannot be permitted so to turn the confidence reposed in him to his own profit, and the sale ought to be set aside.

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Decree affirmed. Petition of appeal dismissed with costs.

Solicitors for the Plaintiff: Messrs. *N., C., & C. Milne.*
Solicitors for the Appellant: Messrs. *Clowes & Hickley.*

BUCKLAND *v.* PAPILLON.

L. C. 1866 Nov. 22, 23.

Leasehold—Option—Bankruptcy—Bankruptcy Act, 1849, *ss.* 141 . . . 147—*Assignee—Election to take lease.*

The owner of a long term in land agreed to let it for three years, and also, when called upon by the tenant, to grant him a lease for three years, seven years, or the whole term. The tenant continued in the occupation beyond the three years, and became bankrupt. The assignee sold the bankrupt's estate and interest in the leasehold to a purchaser:—

Held, first, that the option of the tenant to take a lease was not gone at the end of the three years:

Secondly, that it passed to the assignee in bankruptcy:

Thirdly, that the option had passed to the purchaser.

Order of the Master of the Rolls affirmed.

THIS was an appeal from an order of the Master of the Rolls, overruling a demurrer. The case is fully reported (1). The Defendant appealed.

Mr. *Jessel*, Q.C., and Mr. *Willan*, for the Appellant:—

The tenant had only a right to call for a lease within the three years for which the agreement extended; after that he became a mere tenant from year to year, and his right to elect is gone, and he only holds on upon such terms of his agreement as are applicable to a tenancy from year to year. He could have gone at the end

(1) Law Rep. 1 Eq. 477.

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of the three years, and then his option would certainly be gone too.

In the next place, we contend that an assignee in bankruptcy cannot sell an option. The assignees only take under sect. 147 of the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106), and this is not a power under that section. It was decided, under the old law, that the words "estate and interest," did not carry a power, and therefore sect. 147 of the Act of 1849 was introduced; the same was also decided as to contracts to purchase. But assignees had no power, before that statute, to elect to take a lease, and *à fortiori*, that applies to an option to have a lease. Moreover, the option did not pass to the purchaser, as it was not an estate or interest; and the landlord ought not to be forced to take or assign, especially as the agreement does not mention assigns.

Mr. *Southgate*, Q.C., and Mr. *W. W. Cooper*, in support of the bill:—

It is clear that the tenant held, after the expiration of the three years, as tenant from year to year on the original terms, and the only right which the landlord had, was to call upon him to exercise the option: *Moss* v. *Barton* (1); *Hersey* v. *Giblett* (2). As to the second point, this option is not a power, but is clearly an interest in land under the Bankruptcy Acts, and even if it does not pass under sect. 141 of the Act of 1849, it passes under sect. 146. But, in fact, it is an agreement for a lease, and, as such, passes under sect. 145, and the existence of the option does not affect it. The assignees have elected to take, and have shewn it by offering the lease for sale.

Bankrupts have often options to purchase goods, which have always been held to pass to their assignees. As to the validity of the assignment, the assignees had an interest, and have sold it. They might not have been able to sell to a pauper, but they have sold to a solvent man, and he has all the rights of the bankrupt. The absence of the word assigns makes no difference: *Crosbie* v. *Tooke* (3); *Church* v. *Brown* (4).

(1) Law Rep. 1 Eq. 474.
(2) 18 Beav. 174.
(3) 1 My. & K. 431.
(4) 15 Ves. 258.

Mr. *Jessel*, in reply:—

In *Moss* v. *Barton* (1) the title did not begin until after the expiration of the term. The makers of this agreement never contemplated the continuance of the tenancy for more than three years without the exercise of the option, and at the end of that time the option was gone, and *Bloxam* remained a mere tenant from year to year.

It was held, under the old Acts, that a power did not pass to the assignees, even under larger words: *Lord Townshend* v. *Windham* (2); *Sugden* on Powers (3). The lease does not vest in the assignee until he has elected to take it, which he has not done. Moreover, the landlord in such a case as this is not obliged to take an assignee in bankruptcy as his tenant: *Flood* v. *Finlay* (4); *Weatherall* v. *Geering* (5).

LORD CHELMSFORD, L.C.:—

I do not feel the slightest difficulty upon any of the questions which have been argued in this case. It is a demurrer to a bill asking specific performance of an agreement for a lease made between the Defendant, Mr. *Papillon*, and Mr. *Bloxam*, who afterwards became a bankrupt, and his estate and interest under the agreement have been sold by his assignees to the Plaintiff. The agreement was as follows: [His Lordship read the principal terms of the agreement.] *Bloxam* entered into possession of the cellars, and continued in possession until the month of October, 1864, when he became bankrupt. The creditors' assignee put up for sale by auction, the interest which the bankrupt had under this agreement, and the Plaintiff became the purchaser, and was let into possession, and on the 30th of June, 1865, an agreement was entered into between the assignee on the one part, and the Plaintiff on the other part: [His Lordship read parts of the agreement.] A correspondence then took place upon the subject of the lease, between the solicitors of the Plaintiff and the solicitors of the Defendant, Mr. *Papillon*, and ultimately the lease was refused by

(1) Law Rep. 1 Eq. 474. (3) 8th ed. p. 186.
(2) 2 Ves. Sen. 3. (4) 2 Ball & B. 9.
(5) 12 Ves. 504.

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him, and then this bill was filed for specific performance of the agreement to grant a lease.

Now, upon the demurrer to this bill three questions were raised:—First, whether the bankrupt had not lost his right to call for a lease; secondly, whether he had any interest under the agreement which would vest in his assignees under the bankruptcy; and thirdly, whether the bankrupt's option to take this lease could be the subject of an assignment.

Upon the first point it was argued that the bankrupt had lost his right to demand a lease, in consequence of the lapse of time, and that the agreement was, in fact, for a lease for three years, with an option during that time to name a further term, and that, at the expiration of that term of three years, the right to demand a further lease was gone.

Now, as to this, it must be observed that there was no limitation whatever of the time within which *Bloxam* was to exercise his option. If, during the course of three years, he had determined to have a lease for seven years, that would be from the date of the agreement, and he would only have it for the portion of time which remained to run. Undoubtedly, supposing that at the end of three years *Bloxam* had chosen to leave the place, that would have determined his option; but he continued in possession, and so became tenant from year to year, under the terms of the original agreement. I do not mean to include in those words the right to demand a lease, for that had nothing whatever to do with the tenancy from year to year; but I think that continuing in possession, with the sanction of the landlord, he was entitled to exercise his option. He had done nothing whatever to preclude him from demanding that lease at any time; and if the landlord wished to know upon what terms the tenant held, he might have called upon him to say whether he meant to have a lease or not. As the landlord did not choose to do so, it appears to me that the time was unlimited in which the tenant could demand a lease. As long as he continued tenant with the sanction of the landlord, so long he retained his option.

The next question is, whether this option vested in the assignee in bankruptcy. I agree with the Master of the Rolls, that the bankrupt's option was not a power within sect. 147 of the Bank-

ruptcy Act of 1849, but I have some doubt whether it comes, as his Lordship thought it did, within the terms of sect. 141 as personal estate; but if not, I see no reason why an option to take a lease should not be an interest in land, under sect. 142, though perhaps not such as is included in sect. 146. Clearly, if it is an agreement for a lease, it passes to the assignee, for that is dealt with by sect. 145 as a subject as to which the assignees have an election. Now, whether that interest is vested in the assignees at once, subject to be divested upon their refusal to take to it, or whether it is only conditionally vested in them, subject to their election, is immaterial, because they have the right of option in either case; and I think that they have unquestionably declared their election to take to this agreement.

It was, indeed, argued by Mr. *Jessel*, that the bankrupt, having a mere option to take a lease, could not be said to have an agreement for a lease under sect. 145; but it cannot be contended successfully that a person who may call for a lease at his own will and pleasure may not be looked upon as entitled to an agreement for a lease.

Then it was said that the assignee had not elected to take the bankrupt's interest under the agreement; but what stronger evidence can there be of an election to take, than his putting it up for sale by auction—not merely to ascertain the value, but actually selling it, receiving the purchase-money, and entering into an agreement to execute such deeds and things as might be necessary to perfect the sale.

The only remaining question is, whether the bankrupt's interest can be the subject of assignment. Now there is nothing in the agreement to shew any intention that *Bloxam* should not be at liberty to assign. The absence of the word assigns is quite immaterial, and would not have warranted the introduction of a covenant against alienation in the lease. The authorities cited shew that such an agreement is assignable.

I am clearly of opinion, upon all points, that the order of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Ingle & Gooddy.*
Solicitor for the Defendant: Mr. *C. B. Hallward.*

L. C.

1866

Nov. 21, 22; *Dec.* 4.

WESTERN *v.* MACDERMOTT.

Covenant running with Land—Notice—Waiver—Covenants by Several—Parties.

Each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house:—

Held, that whether the covenants did or did not run with the land, a purchaser of one of the houses, with notice of the covenants, would be bound by them in equity.

Whether the covenants ran with the land, *quære*.

Injunction granted at the suit of the owner of one of the houses, restraining a breach of the covenants by the owner of another house, notwithstanding that small breaches of the covenants by other owners had not been interfered with, and that he himself had committed a small breach.

Held, also, that the other owners of houses were not necessary parties to a suit by one to restrain a breach of the covenants.

Decree of the Master of the Rolls affirmed.

THIS was an appeal from a decree made by the Master of the Rolls granting an injunction to restrain the Defendant from building a bow-window at the back of his house in *Brock Street, Bath.* The facts of the case appear in the report of the hearing in the Court below (1).

Mr. *Baily*, Q.C., and Mr. *Haddan*, for the Plaintiff:—

We contend that this covenant runs with the land; but this is immaterial, as the Defendant had notice on his title deeds of the existence of the covenant, and is therefore bound by it in equity, at all events. As to the trees which have been allowed to grow on some of the gardens, they do not interfere with us, and we do not complain of them: *Johnstone* v. *Hall* (2); *Tipping* v. *Eckersley* (3).

Mr. *Selwyn*, Q.C., and Mr. *C. Hall*, for the Defendant, *MacDermott*:—

We contend that we have not broken the covenant at all. More-

(1) Law Rep. 1 Eq. 499. (2) 2 K. & J. 414. (3) 2 K. & J. 264.

over, there are many trees growing on other parts of these gardens, the continuance of which has been acquiesced in by the Plaintiff, and by every one. The Plaintiff himself has broken the covenant, by allowing a tree in his own garden to grow above the proper height, and therefore cannot complain of the Defendant. As to the covenant running with the land, the right to sue, if any, is now vested in *Tite*. If it is said that the Defendant had notice of the covenant, he had also notice that it had been disregarded by the other owners. Moreover, the Plaintiff has made out no case of real injury, and the utmost he can have is an inquiry as to what damages he is entitled to. A mere nominal breach of a covenant is no ground for an injunction; the Plaintiff has also committed a small breach, and the Court will not weigh two small injuries very nicely. In any case, the Plaintiff ought to make all the other owners of houses holding under this covenant parties to this suit: *Eastwood* v. *Lever* (1).

Mr. *Jackson*, for the Defendant *Tite*.

Mr. *Haddan*, in reply.

Dec. 4. LORD CHELMSFORD, L.C., after stating the facts of the case, and the substance of the decree made by the Master of the Rolls, continued:—

Various objections were made to the Plaintiff's right to interfere with the Defendant's building.

Before the Master of the Rolls, the question appears to have been raised, whether the covenant against building beyond a certain height, in the original conveyance of the Defendant's house, was a covenant which ran with the land. But I am relieved from the necessity of considering the question, because it was admitted on the part of the Defendant, that, he having purchased his house with notice of the restrictive obligation attached to it, a Court of equity would interfere to prevent his violation of it. This, indeed,

(1) 33 L. J. (Ch.) 355.

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could not be disputed, after the cases of *Tulk* v. *Moxhay* (1), and *Coles* v. *Sims* (2).

But the Defendant, admitting that he is bound by the covenant, denies that he has been guilty of any violation of it, because the prohibition against building is confined in terms to the garden, and he alleges that he has not built upon the garden.

[His Lordship then considered the facts and the evidence, and came to the conclusion that the bow or projection was upon the garden within the meaning of the covenant.]

But the Defendant contends that, even if the covenant would have been originally applicable to the proposed addition to the back of his house, it has long since ceased to be so, inasmuch as it has been generally disregarded by the owners of the other houses on the south side of *Brock Street;* and buildings have been erected, and trees have been planted, in violation of the covenant, without any attempt to enforce it. But, assuming that the Plaintiff and his predecessors have suffered these things to pass without notice when they sustained no particular injury, how can that deprive the Plaintiff of his equity to use the covenant for his protection where the breach of it immediately affects the enjoyment of his house? It is not like the case of *Duke of Bedford* v. *Trustees of the British Museum* (3), where a covenant not to use the land conveyed in a particular manner with a view to the more ample enjoyment of the adjoining lands of the feoffor, was sought to be enforced by the Plaintiff, in whom the adjoining lands were vested, after the whole of the property had been altered by his consent. The Court, without expressing any opinion whether an action at law could be maintained, refused the injunction upon the ground that the party seeking to enforce the obligation which applied to the property in its former state had himself created the alteration out of which a new set of interests and rights had arisen. I cannot, however, understand how a passive acquiescence in one breach of covenant can be considered to be a waiver for all future time of the right to complain of any other breach.

But the Defendant alleges that the Plaintiff has not only acquiesced in breaches of the covenant by others, but that he has

(1) 2 Ph. 774. (2) 1 Kay 56; 5 D. M. & G. 1. (3) 2 My. & K. 552.

been guilty of a breach of it himself by permitting trees above the prescribed height to remain upon the ground at the back of his house. The only tree to which this observation applies is a mulberry tree, which, though it has been periodically trimmed and cut, was at the time of filing this bill above the limited height. This appears to me to be a frivolous objection. No complaint has ever been made as to this tree, nor has it produced the slightest injury to any one. If the Plaintiff had been requested to reduce its height, and had refused, and had proceeded to complain of the Defendant's building, there would have been something to have urged against him, but, under the circumstances, there is not the shadow of an answer to the Plaintiff's bill upon this ground.

The Defendant, in the next place, says that, admitting the addition to his house to be a violation of the covenant, yet that equity will not interfere, as the Plaintiff has not sustained, nor is likely to sustain, any actual damage thereby. Whether this ground of non-interference by equity can be applicable to a case of this peculiar description, may be matter deserving of some consideration. The object of the covenant was to prevent, for all future time, any obstruction to the view from the backs of the houses on the south side of *Brock Street* by buildings or trees above a certain height. Any building erected, or any tree permitted to grow above this height, would be a breach of the covenant; and yet the damage to any one of the owners of the houses might be scarcely appreciable. If, then, it were necessary to wait until "substantial injury" (to use the words of the Master of the Rolls) were sustained, that period might never arrive, although violations of the covenant might be continually occurring, and the owners of the houses would never be in a situation to invoke the interposition of this Court to prevent the breach of a covenant intended solely for their benefit. But it is unnecessary to determine this question, because there is evidence, upon which the Court may fairly act, that actual damage will be produced by the Defendant's building diminishing the value of the Plaintiff's house.

The Defendant says, in the last place, that even if his proposed building entitles those who are interested in the covenant to apply for the protection of the Court, yet that the Plaintiff cannot sue alone, but all the owners of the houses who are the assigns of the

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original covenantee, ought to be parties to the suit. It may be observed that this objection is a little at variance with the former one,—that no person who does not sustain actual damage can apply to the Court for an injunction. The owners of the houses remote from the Defendants may possibly not sustain the slightest injury, and it would be rather strange that they who, according to the former argument, could not have sued at all on their own rights, should yet be necessary parties to a suit by the only sufferer from the violation of the covenant. I think that the owner of a house, who is injuriously affected by acts which are contrary to the covenant, may proceed against the party who commits them, without requiring the other owners, to whom they are not in the smallest degree prejudicial, to join him in the suit.

The Defendant's grounds of resistance to the injunction altogether failing, the decree of the Master of the Rolls must be affirmed, and the Petition of appeal dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Western & Son.*

Solicitors for the Defendants: Messrs. *Clarke, Woodcock, & Ryland;* Messrs. *Hollingsworth, Tyerman, & Green.*

FERGUSON *v.* WILSON.

L. JJ.
1866
Nov. 5, 6, 7.

Company—Specific Performance of Contract to allot Shares—Damages—Sir H. Cairns' Act (21 & 22 *Vict.* c. 27)—*Liability of Directors—Evidence—Oral Examination at the Hearing*—15 & 16 *Vict.* c. 86, s. 39.

The Plaintiff by his bill prayed the specific performance of a resolution passed by the board of directors of a railway company, under which he alleged that he was entitled to have a certain number of shares allotted to him; and he also prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages. All the shares had been allotted before the filing of the bill:—

Held, that as no relief by way of specific performance was possible, the Plaintiff's claim for damages under *Sir H. Cairns' Act* (21 & 22 Vict. c. 27) failed also.

Decree of *Stuart*, V.C., affirmed.

In such a case the Plaintiff's claim against the directors to be indemnified out of their shares was only a claim for damages in another form.

Per CAIRNS, L.J.:—Directors are agents of the company, and their personal liability in a suit, upon a contract made by them, must be governed by the ordinary law of principal and agent. But a shareholder may sustain a bill against directors personally, where he charges them as trustees, and seeks redress against them for a breach of duty to the company of which he is a member.

In a case where, under the old practice, the Court would have directed at the hearing an inquiry or issue on a doubtful question of fact, the Court may now examine a party or a witness *vivâ voce* at the hearing, under the 39th section of the 15 & 16 Vict. c. 86.

Whether that section applies to a person not a party who has not been a witness in a previous stage of the proceedings—*Quære.*

THIS was an appeal from a decision of Vice-Chancellor *Stuart.*

The *Washoe United Consolidated Gold and Silver Mining Company, Limited*, was registered on the 17th of July, 1864, and the Plaintiff, *George Ferguson*, was one of the promoters and original directors.

On the 15th of June, a meeting of the promoters was held, at which the following resolution was passed with reference to advances to be made to the company, which resolution was confirmed by the directors at a meeting held after the registration of the company:—

"In consideration of *A.* or *B.* making an advance for a period of

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two months, to enable operations at the *Washoe* mines to be continued, it is hereby resolved and agreed that, at any time after the expiration of the said two months (from the date of advance), such advance, on application by *A.* or *B.*, shall be repaid from any moneys, held in hand at the time being, of the company, and that, so long as the said amount shall remain unpaid, interest after the rate of £6 per cent. per annum shall be paid for the same to the said *A.* or *B.* And it is further resolved that *A.* or *B.* shall have the option at any time, while the amount remains unpaid, of shares in the *Washoe Consolidated Gold and Silver Mining Company*, or partly paid-up shares, to the amount, or for such part thereof as the said *A.* or *B.* may desire, or of accepting a deposit receipt of £1 per share on five hundred shares, or any proportion thereof, at the said *A.* or *B.'s* discretion."

In pursuance of this resolution, the Plaintiff advanced, on the 17th of June, the sum of £500, and, on the 1st of July, a further sum of £200.

On the 4th of October in the same year, the directors passed a resolution that the advances made in June and July should be repaid as the funds of the company would allow, and that cheques should be given on application. Accordingly, on the 9th of November, the secretary sent the Plaintiff a scrip certificate for 500 fully paid-up shares, in repayment of his first advance, and a cheque for £204 6*s.* 2*d.*, in repayment of his advance of £200, with interest thereon. The Plaintiff, not having applied for the repayment of his loan, refused to accept the scrip certificate and cheque, which he returned to the secretary.

On the 15th of November the secretary sent the Plaintiff a cheque for £514 2*s.* 1*d.*, enclosed in a letter containing a statement of his account with the company, in which credit was given him for his two advances, and he was debited with two calls of £1 each on 100 shares, which the Plaintiff had agreed to take as his qualification as a director.

On the 16th of November a general meeting of the shareholders was held, which the Plaintiff attended, and he there proposed a resolution that the unallotted shares in the company should not be disposed of without the consent of the shareholders; but the reso-

lution was negatived, and in its place an amendment was carried to the effect that the unallotted shares should be offered to the registered shareholders *pro ratâ* according to their holdings.

On the 17th of November the Plaintiff replied to the secretary's letter of the 15th, returning the cheque for £514 2*s.* 1*d.*, and requesting that 700 shares, on which £1 had been paid, might be allotted to him, in repayment of his advances, in accordance with the resolution of the 15th of June.

An extraordinary general meeting was held on the 2nd of December for the purpose of confirming the resolutions passed on the 16th of November, but the resolution as to the allotment of the unallotted shares was not confirmed, and those shares, therefore, remained at the disposal of the directors.

On the 18th of November a meeting of the directors was held, at which the Plaintiff pressed his claim to receive shares in repayment of his advances, but modified his application by asking for 500 shares, on which £1 had been paid, and 100, on which £2 had been paid, it being understood that the last-mentioned 100 shares should be considered as those which he had agreed to take as a director of the company. The chairman declined to accept the application until the opinion of Counsel had been taken as to the construction of the resolution of the 15th of June.

The opinion of Counsel was accordingly taken by the directors, and was to the effect that the resolution did not prevent the company from paying off the debt at any time prior to the lender making his election, and that, as the Plaintiff's loan had been repaid before he had made any election, he was in the position of any other shareholder. The secretary accordingly again sent the cheque for £514 2*s.* 1*d.* to the Plaintiff, and on the 7th of December the directors proceeded to allot the unallotted shares to the various shareholders without regard to the Plaintiff's claim.

On the 21st of December the Plaintiff, having, in the meantime, ceased to be a director, filed his bill against the company and the directors, praying that he might be declared entitled to 700 shares, on which £1 had been paid, or 500 shares, on which £1, and 100, on which £2, had been paid, and that the directors might be ordered to allot the same accordingly, and that the

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directors might be restrained from allotting the unallotted shares in such manner as to render it impossible for them to make the allotment.

The allegation in the bill, as to the letter of the 15th of November, was this: "On the 15th day of November, 1864, the said secretary sent to the Plaintiff a cheque for £514 2*s.* 1*d.* on behalf of the said company, and on the same day wrote and sent to him a letter of that date, which was as follows," saying nothing as to the time when the letter was received. The meeting of the 16th of November was set up by the Defendants, but it was not mentioned in the bill.

The Defendants put in a voluntary answer to the bill, in which they stated that the whole of the shares had been allotted before the filing of the bill, and that the Defendant had been informed of that fact by the secretary on the 19th of December.

With regard to the letter of the 15th of November, they stated as follows:—"We are informed, and believe, that such letter, with its inclosures, was posted by Mr. *Robertson* (the secretary) on the said 15th day of November, 1864, in sufficient time to be delivered, and we believe that in course of post the same, together with the inclosures, was delivered, at the Plaintiff's address, *Ward's Wharf, Southwark*, in the evening of the said 15th of November, 1864."

The answer then set forth what passed at the meeting of the 16th in nearly the same terms as above, and proceeded to state that, immediately after the meeting, in consequence of favourable advices which had been read at it, and of the resolution which had been passed by it, the price of the shares rose to a considerable premium, and that the Plaintiff's letter of the 17th was not delivered at the office of the company till the 18th.

The Plaintiff then amended his bill, alleging that if all the shares had been allotted, some of them had been allotted to the directors, and praying that they might transfer a sufficient number of them to him, or else that they might be answerable in damages as the Court might direct.

The Plaintiff did not introduce any fresh statement respecting the receipt of the letter of the 15th of November, nor did he enter into any evidence as to the time of the actual receipt; and the

evidence on the part of the Defendants as to this point was exactly the same as the statement in their answer.

The Vice-Chancellor dismissed the bill, being of opinion that the Plaintiff, by keeping the cheque for £514 2*s.* 1*d.* till after the meeting of the 16th of November, had elected to accept it in payment of his advances, and could not afterwards claim an option to receive shares.

When the cause came on for hearing before the Lords Justices, the Plaintiff tendered himself and a Mr. *Price*, who had not given evidence in the cause, for examination, for the purpose of proving that, owing to his being absent from his place of business during the whole of the 16th of November, he had not received the letter containing the cheque until the morning of the 17th, the day following the meeting.

The counsel for the Defendants objected to the proposed examination, which had been refused in the Court below.

Mr. *Malins*, Q.C., and Mr. *E. K. Karslake*, for the Plaintiff, proposed the admission of the evidence.

Mr. *Bacon*, Q.C., and Mr. *Elderton*, for the Directors; Mr. *Greene*, Q.C., and Mr. *W. C. Harvey*, for the company:—

There is no conflict here on the proceedings; the pleadings and evidence all go the same way. The answer does not, indeed, in terms allege that the Plaintiff had the letter and cheque in his possession at the meeting; but the context clearly suggests the materiality of it. There is no precedent for allowing the Plaintiff, in such circumstances, to adduce fresh evidence at the hearing: *Glover* v. *Daubeny* (1); *Oliver* v. *Wright* (2).

Mr. *Karslake*, in reply:—

There is no doubt a rule that a party is not to be allowed to bolster up his case by fresh evidence, when he has in the course of the proceedings found out the weak point of his case. But, on the other hand, the Court will not allow a party to be taken by surprise, and where his attention has evidently not been called to the materiality of a particular date fresh evidence will be allowed.

(1) 9 Jur. (N. S.) 90. (2) 1 Sm. & Giff. App. xvi.

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Until the Vice-Chancellor had made the receipt of this letter before the meeting the principal ground of his decision, the point had not been considered material.

SIR G. J. TURNER, L.J.:—

There is nothing as to which I am more sensitive than breaking in upon the rule of the Court against admitting further evidence after the evidence in the cause has been closed, and I always am reluctant to admit it at the hearing of an appeal. But, at the same time, I have as little inclination to cripple the useful power conferred on the Court by the 15 & 16 Vict. c. 86, s. 39, which clearly was given to enable the Court to ascertain the truth on any material point, without putting the parties to the expense of a long and complicated inquiry. I had occasion to consider this section early in my judicial career, and am of opinion that its powers may properly be exercised wherever the Court, under the old practice, would have directed an issue or an inquiry, and that witnesses will be examined under this section where the Court cannot, on the materials before it, come to any satisfactory conclusion on a question of fact. In the present case I cannot but suspect that when the pleadings were filed neither party saw the possible importance which might attach to the question at what time the letter of the 15th of November was actually received. There is not, on either side, any specific positive allegation on the point. The Plaintiff's allegation is, that it was written and sent on the 15th, the Defendants allege that it was posted in time to be delivered on the 15th, and that they believe it was delivered at the Plaintiff's address on that day. Evidence whether it was actually delivered at that time or not is wholly wanting. Assuming, as we must for the present purpose, that it may be of importance whether the letter was in the hands of the Plaintiff before he attended the meeting of the 16th of November, it is impossible for the Court upon the present materials to come to a satisfactory conclusion on the case. The answer and evidence of the Defendants go no further than belief that the letter was delivered at a certain place on a certain day. There is no proof that it was delivered on that day, and no proof that the Plaintiff was at the place on that day. In such a case, the Court would not be justi-

fied in acting without inquiry, and instead of an inquiry the Court ought now to endeavour to ascertain the fact at the hearing. I am of opinion, therefore, that the evidence of the Plaintiff ought to be received. It has been objected that this evidence is tendered too late; but an appeal to this branch of the Court is only a rehearing of the cause, and we ought to take now the course which, in our opinion, it would have been right for the Vice-Chancellor to take at the original hearing. I do not think it necessary to go further, at present, than to say, that the Plaintiff ought to be examined. With respect to Mr. *Price* we at present say nothing, for there arises a question on the meaning of the words of the section which it may be unnecessary to decide, whether the word "witness" means any person who may be then called to give evidence as to the particular fact, or whether it means only persons who have already given evidence in the cause. As the section says, "witness or party in the cause," there is no difficulty as to the Plaintiff, and we, therefore, go no further at present than deciding that he may be examined.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion, and for the same reasons.

The Plaintiff was accordingly examined, and gave evidence shewing very distinctly that he did not receive the letter till the morning of the 17th. The point, however, in the view which their Lordships took of the case ultimately became immaterial.

Mr. *Malins*, Q.C., and Mr. *E. K. Karslake*, then argued in support of the appeal:—

The Vice-Chancellor agreed with us that, on the true construction of the resolution of the 15th of June, the Plaintiff had an option of taking shares instead of money in satisfaction of his advances. The main question, therefore, between us and the Defendants, is, whether the Plaintiff had waived his option or accepted payment. The Vice-Chancellor rested his opinion on the supposition that the Plaintiff had accepted payment in money by retaining the cheque: but it is now satisfactorily proved that he did not receive it or hear of it till after the meeting of the 16th

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of November. What passed at that meeting, therefore, could amount to no election. The mere tender of the money could not terminate his option; and, moreover, the existence of the option was recognised by the directors at the meeting of the 18th of November.

If the Plaintiff cannot have the shares, he is entitled to damages under *Sir H. Cairns' Act* (21 & 22 Vict. c. 27). He had originally good ground for relief in equity, and if the directors have put it out of their power to satisfy his claim, they are personally liable. The directors, as well as the company, are therefore properly made parties: *Bagshaw* v. *Eastern Union Railway Company* (1); *Howe* v. *Hunt* (2); *Davenport* v. *Rylands* (3). The shares have lost all their value since the time when they ought to have been allotted, and the measure of damages is the amount of the highest premiums in the interval.

Mr. *Bacon*, Q.C., and Mr. *Elderton*, for the directors:—

The directors passed the resolution of the 15th June, and acted throughout the transactions in the discharge of their duty as officers of the company, and incurred no personal liability to the Plaintiff. When the bill was filed, all the shares having been allotted, it was impossible for the Plaintiff, as he well knew, to obtain relief in the form of specific performance. He had, therefore, no ground on which to found his application for relief to this Court, and his claim for damages under *Sir H. Cairns' Act* fails: *Durell* v. *Pritchard* (4).

Mr. *Greene*, Q.C., and Mr. *W. C. Harvey*, for the company:—

The bill does not allege any misconduct on the part of the company. The allotment of shares was entirely within the powers of the directors, and if they exceeded those powers the company is not responsible: *Royal British Bank* v. *Turquand* (5); *Ernest* v. *Nicholls* (6).

The Plaintiff's option was put an end to by the tender of payment; for which purpose the tender of a cheque is equivalent to

(1) 7 Hare, 114.
(2) 31 Beav. 420.
(3) Law Rep. 1 Eq. 302.
(4) Law Rep. 1 Ch. 244.
(5) 6 E. & B. 327.
(6) 6 H. L. C. 401.

the tender of money, if it is not objected to at the time: *Polyglass* v. *Oliver* (1); *Jones* v. *Arthur* (2).

Mr. *E. K. Karslake,* in reply.

SIR G. J. TURNER, L.J., after referring to the facts of the case, continued:—

The questions which in this case are material to be considered, seem to me to be these—What was the contract created by the resolution? Between whom was the contract entered into? And whether the remedy upon that contract is, under the circumstances of the case, proper to be claimed in this Court?

Upon the first of these points, what was the contract between the parties? I take the view of that contract the most favourable to the Plaintiff's case, and I assume that he had a right of election to be paid the moneys which he advanced, either in money or in shares, and that the company had no right to pay the money without giving him that election. I say no more upon that point than that I assume it in favour of the Plaintiff. The point is, in my opinion, one which it is not necessary for us to decide.

On the second question, between whom this contract must be taken to have been made, I take it to have been entirely a contract between the Plaintiff and the company. Whether the directors had or had not power to make a contract, the contract, as I understand it, was intended to be, and was in fact, a contract between the Plaintiff and the company, the company acting, or intending to act, through their directors, in making and entering into that contract; because the advance is an advance which is clearly to be made to the company, and the allotment is an allotment which is to be made by the company, and out of the assets of the company. It cannot, therefore, be considered as a case of contract between the Plaintiff and the other directors of the company, or as a case of contract between all the directors, including the Plaintiff, and the Plaintiff in his individual character; it is simply a case, and was intended to be a case, of contract between the Plaintiff and the company.

(1) 2 C. & J. 15. (2) 8 Dowl. 442.

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Then the question arises—which is, in my judgment, the only important question in this case—whether the remedy upon that contract is in equity or not? This Court can only deal with a contract by way of specific performance, and the question therefore resolves itself into this,—whether, under the circumstances of this case, there can be a specific performance of that contract?

In order specifically to perform the contract, it would be necessary that the directors of the company should allot shares to the Plaintiff according to the claim which has been made by him, and which I have assumed to be a just and proper claim. Could or could not this have been done at the time of the filing of this bill? At that time, according to the evidence before us, all the shares had been allotted, and it was not possible, therefore, that the claim of the Plaintiff to have shares allotted to him according to the title which he set up could have effect given to it by this Court. Not only was this so, but it is clear that before the filing of this bill the Plaintiff had been told that it was so, for it appears that on the 19th of December, 1864, the secretary of the company, by the direction of the company, wrote to the Plaintiff informing him that all the shares in the company had been allotted. By the Plaintiff's own affidavit it appears that he received that letter on or about the 19th of December, and this bill was not filed until the 21st of December, two days after the allotment was made. Probably this was not known to the Counsel at the time when the bill was drawn; and, according to the bill as originally framed, the prayer was, that the allotment might be made by the directors to the Plaintiff, and that an injunction might be granted to restrain the Defendants, the directors, from disposing of the shares, so as to prevent the allotment being made. That would be quite correct, upon the assumption that there were shares which had not been allotted remaining sufficient to answer the Plaintiff's claim; but when the answer came in to this bill, it appeared that, in truth, according to the allegations of the Defendant, all the shares of the company had been allotted, and there were no shares which could be allotted to the Plaintiff. Then the bill was amended by praying that in that event the directors should, out of the shares which had been allotted to them individually, make good to the Plaintiff the shares to which he claimed to be entitled, or that they might

pay damages in respect of being unable to fulfil what the bill insists was a contract on their part to allot in favour of the Plaintiff.

This wholly varied the character of the bill, and the fact that the shares had been disposed of before the bill was filed, to an extent which disabled the allotment, wholly altered the position of the Plaintiff with respect to the right to file a bill in equity. For if, as a matter of fact, all the shares were gone before the filing of the bill, and were beyond the reach of the parties, so that no allotment could be made in favour of the Plaintiff, there could be no specific performance of the agreement, and no right to come into equity upon any other ground, unless, indeed, the Plaintiff could come to this Court for damages, a claim to which I shall presently refer.

[His Lordship then considered the allegations in the pleadings, and in the affidavits, respecting the allotment of the remaining shares by the directors, and continued:—]

Therefore, in this state of the evidence, it seems to me that the specific performance of this agreement is entirely out of the question. The agreement cannot be specifically performed, if the shares have been already validly allotted in favour of other shareholders of the company.

The bill then prays damages in, I may say, a double form. It prays, in the first place, that the directors of the company may, out of the shares which have been allotted them, transfer to the Plaintiff those shares which, according to his contention, would have been proper to be allotted to him. What in truth is that but asking for payment of damages by the directors of the company in the shape of a sacrifice of the shares which have been allotted to them, instead of in money? If a man has to make good a certain claim, it is just the same thing whether he makes it good by paying a sum of money, or by parting with other property to which he has become validly entitled. In truth, therefore, that part of the prayer which seeks the transfer of the shares by the directors is no other than a prayer for damages. There may be cases in which, if there is a trust relation subsisting between *A.* and *B.*, and *B.* has taken property under the

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trust which belongs to *A.*, or ought to have been appropriated to *A.*, the Court will compel *B.*, out of the property which he has so taken, to make good that of which *A.* has been deprived. But this is not a case of trust; this is simply a case of contract, as I think, between the Plaintiff and the company; but if it goes further, it is a case of contract between the Plaintiff and the other directors. I am not aware that there is any law of this Court which in a case of contract, not raising any question of trust, would put upon a Defendant in a suit the obligation of satisfying the claim in the mode in which the Plaintiff contends that it ought to be satisfied.

There remains the question of damages, and that depends entirely upon the effect of that very valuable Act which my learned brother passed through Parliament, commonly known as *Sir Hugh Cairns' Act* (1). I understand that Act to mean this:—There was great difficulty in cases of specific performance, and also in cases of injunction, before the passing of that Act, arising under this state of circumstances. There were many cases where a Court of equity would decline to grant specific performance, and yet the Plaintiff might be entitled to damages at law; and great complaints were constantly made by the public, that when Plaintiffs came into a Court of equity for specific performance the Court of equity sent them to a Court of law in order to recover damages, so that parties were bandied about, as it was said, from one Court to the other. The object, therefore, of that Act of Parliament was to prevent parties from being so sent from one Court to the other, and accordingly the Act provides that the Court may either, in addition to or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another Court. But that Act never was intended, as I conceive, to transfer the jurisdiction of a Court of law to a Court of equity. If, therefore, a Plaintiff in a suit in equity had no equitable right at the time of filing the bill—for the case would be quite different if there was an equitable right at the time of filing the bill—so that the bill was altogether improperly filed in equity, I am of opinion that the Act has no application; otherwise the consequence would necessarily be, that everybody who had a doubtful case at law

(1) 21 & 22 Vict. c. 27.

would come into equity for specific performance, and when it appeared that he had no case in equity at all he would ask for damages, and so almost every action of contract would be transferred from a Court of law to a Court of equity. That, according to my view of this subject, was never intended to be the effect of the Act of Parliament. I have had occasion to consider the Act in many cases, and have always entertained the same opinion about it.

I think, therefore, there being, according to my judgment, no case in equity for the Plaintiff at the time when the bill was filed, it being a mere question of contract between the Plaintiff and the company, the remedy on that contract was at law, and not in equity, and that this bill was improperly filed, and was properly dismissed by the Vice-Chancellor. Accordingly, I think that this appeal cannot be sustained. At the same time, as we have other evidence before us than that which was before the Vice-Chancellor, and as we do not proceed altogether, or mainly, perhaps, on the same grounds as those on which the Vice-Chancellor proceeded, I think the appeal should be dismissed without costs; and I think it will be right at the same time to add to the decree, that it shall be without prejudice to any proceedings at law which the Plaintiff may be advised to take.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion. I take first the case of the directors, the first nine Defendants upon the record. Now, I think that it ought to be very clearly understood upon what principle, and to what extent, directors in suits of this kind are liable to the jurisdiction of this Court. This is a bill filed upon a contract. With whom has the contract been made? The bill alleges that the contract is made with and binds the company. What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability

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of the company. This being a contract alleged to be made by the company, I own that I have not been able to see how it can be maintained that an agent can be brought into this Court, or into any other Court, upon a proceeding which simply alleges that his principal has violated a contract that he has entered into. In that state of things, not the agent, but the principal, would be the person liable.

I rather imagine that any confusion which has arisen upon this point arises in this way. There is no doubt whatever that it is a proper course, when a Plaintiff comes into the Court of Chancery to restrain the doing of an unlawful act by a company, to make the directors parties to his bill, because the company must act through the directors, and the injunction will operate upon the consciences of the directors, if an injunction is ordered by the Court. But it is altogether a different matter where the cause comes to the hearing, and it is no longer a question of injunction, but a question what liability has been incurred by reason of the breach of contract.

Again, we must distinguish the present case altogether from those cases, very familiar to the Court, where a shareholder files a bill against the company and against the directors, treating the directors as his trustees, which in point of law they are, and seeking redress against them for a breach of trust. That kind of case is exactly the converse of the present. There the shareholders who file the bill, in point of fact allege that the company has done no wrong whatever, that it is the executive which has committed the wrong, and they—the shareholders—file the bill to protect, as it were, the company from the unlawful acts of the directors. There the directors, being in the position of trustees, are of course liable in this Court. I therefore think, as regards the directors, the first nine Defendants in this suit, that as there is now no case for an injunction there is no case whatever for a decree against them personally.

Then I take the case of the company. Now, upon the questions which have been argued as to the construction of this resolution I will not say more than this, that nothing that I have heard has convinced me that the view of the Plaintiff as to the construction of the resolution is an erroneous view. As at present advised I

incline to think that the Plaintiff had a right under this resolution to exercise the option of taking shares, and that he has been deprived of that right. I say that it is my impression, but it is unnecessary, for other reasons, to decide it in the suit. But what is the suit for? It is a bill for specific performance of a contract. We all know that this is not the Court, as a general rule, to entertain suits for damage for breach of contract, whereas it is a Court to entertain suits for specific performance of contract. Now what is asked to be performed is a contract which is to give to the Plaintiff certain shares in this company. He asks that the contract may be performed.

[His Lordship then referred to the statements in the pleadings respecting the allotment of shares, and continued :—]

The bill, as amended, seems to me no longer to assert or to raise the issue that there are unallotted shares; but, on the contrary, to accept the statement that there are no such shares to allot. Now, that being the case, how would the matter stand if we put the Act of 1858 (1) out of the question? I suppose that there can be no controversy but that, before that Act, a bill filed in the Court of Chancery stating a contract, and alleging that the subject matter of the contract no longer existed, or could no longer be made over to Plaintiff, or a suit in which those facts appeared, must, as a matter of course, have been dismissed; the Court of Chancery could have no jurisdiction in such a case. Does the Act of 1858 make any difference? The important words of the Act are these :—"In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement." That, of course, means where there are, at least at the time of bill filed, all those ingredients which would enable the Court, if it thought fit, to exercise its power and decree specific performance—among other things where there is the subject matter whereon the decree of the Court can act—in a case of that kind, the Court has a discretionary power to award, under certain circumstances, damages in substitution for, or in addition to, the decree for specific performance. The object obviously was to enable the Court of

(1) 21 & 22 Vict. c. 27.

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Chancery to do "complete justice," as it was called, a phrase which assumed that there was the power in the Court of Chancery to make a decree to some extent, but not to make a decree to the whole extent which the case required. But that seems to me not in any way to give to the Court a power, where it has no jurisdiction, to decree specific performance, for want of the subject matter whereon its decree would operate, to give damages by reason of some antecedent breach of contract. I, therefore, think that the bill fails for these reasons as against the company as it does against the directors.

With respect to the question of costs, I must say that I entertain a very strong opinion that, as a general rule, costs ought to follow the result of litigation, both upon appeals and in the Court below, and that where we depart from that rule, a reason ought to be assigned for the departure. I think there are two reasons in this case which are perfectly sufficient. In the first place, I cannot think that the directors here took exactly the proper course with regard to the claim of the Plaintiff. They knew, before the shares were allotted, that the Plaintiff was asserting his claim to certain unallotted shares; they knew that he never had abandoned that claim; and I think it would have been better if they had put aside the number of shares that would have answered his claim for a reasonable length of time, until they had ascertained, either that he had abandoned his claim, or what the result of litigation upon that claim might be. That is the one reason. The second reason is that which has been adverted to by my learned brother. Our decision, although we arrive at exactly the same conclusion which the Vice-Chancellor arrived at, does not proceed upon the same grounds, and, under those circumstances, I think we may safely dismiss the appeal without costs.

Solicitors for the Plaintiff: Messrs. *Stephens & Sons.*
Solicitor for the Defendants: Mr. *J. Richardson.*

Ex parte THATCHER. *In re* THATCHER.

L. JJ.
1866
Nov. 9.

Bankruptcy—Trust Deed—Dissentient Creditor—Leave to issue Execution—Bankruptcy Act, 1861, *s.* 198.

Where a debtor has executed a trust deed under the 192nd section of the *Bankruptcy Act*, 1861, and it has been duly registered, a creditor who has not executed it is equitably in the same position as those who have; and although the deed contains no release of the debtor, the Court will refuse to give leave to such a creditor, under the 198th section, to issue execution, unless he shews some special grounds.

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THIS was an appeal from an order of Mr. Commissioner *Holroyd*, made on the 28th of June, 1866.

The Appellant, *Charles Thatcher*, on the 21st of November, 1865, executed a deed assigning all his property to a trustee for the benefit of his creditors, and the deed was executed by the requisite majority of creditors, and duly registered. The deed was drawn in the form given in Schedule D of the *Bankruptcy Act*, 1861, and consequently contained no clause releasing the debtor from the claims of his creditors.

In June, 1866, the Respondents, Messrs. *Thomas*, who had refused to execute the deed, brought an action in the Court of Exchequer against the Appellant for a sum of £11 17*s.* 3*d.*, for goods sold and delivered, and recovered judgment against him for their claim, and costs. The debtor did not plead the deed in bar of the action, but suffered judgment by default.

The Respondents then applied to the Court of Bankruptcy under the 198th section of the *Bankruptcy Act*, 1861, for permission to issue execution against the debtor, which the Commissioner granted (1). From this order the debtor appealed.

(1) The section is as follows:—"After notice of the filing and registration of such deed has been given as aforesaid, no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of *England*, shall be available to any creditor or claimant, without leave of the Court; and a certificate of the filing and registration of such deed under the hand of the chief registrar and the seal of the Court, shall be available to the debtor for all purposes as a protection in bankruptcy."

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Mr. *De Gex*, Q.C., for the Appellant:—

The learned Commissioner appears to have proceeded upon the notion that because the deed of assignment could not be pleaded at law in bar of an action by the creditor, it was a matter of course to allow him to proceed to execution. But this was an entire misunderstanding of the effect of the Act. When the proper number of creditors have signed the deed a dissentient creditor is as much bound as if he had executed it himself, and although the debtor cannot plead it at law, all the creditors are bound by it equitably, as much as if it contained a formal release. Under the *Consolidation Act* of 1849, a debtor could obtain an order from the Court to stay execution under similar circumstances. By the present Act the debtor is relieved from the necessity of coming to the Court for an injunction, and the duty is laid upon the creditor of obtaining leave to proceed. But the Court will have regard to the equitable operation of the deed, and will only grant leave under special circumstances: *Ipstones Park Iron Ore Company* v *Pattinson* (1); *Clarke* v. *Williams* (2); *Jones* v. *Morris* (3).

Mr. *Fischer*, for the Respondents:—

It is admitted by the Appellant that the deed in this case could not be pleaded as a release at law. The onus is, therefore, on the debtor to shew that the creditor ought not to be allowed to proceed with his action. Otherwise he is entitled to leave as of course. In the present case the creditor had dissented from the deed, and was affected by no personal equity obliging him to submit to it: *Ex parte Nelson* (4).

Sir G. J. Turner, L.J.:—

I assume that this deed cannot be pleaded at law, but our jurisdiction is both legal and equitable, and the question is, whether the creditor is not bound by the deed in equity. With the most unfeigned respect for the judgment of the learned Commissioner, from whom I seldom find good reason to differ, I think that, on looking to the language of this statute, it is clear that if the credi-

(1) 2 H. & C. 828.
(2) 3 H. & C. 1001.
(3) 34 L. J. (Q. B.) 90.
(4) 13 W. R. 60.

L. JJ.
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Ex parte THATCHER.
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tor had executed the deed, he would never have been permitted to sue out execution on his judgment. But the statute places a dissentient creditor exactly on the same footing as if he had executed, provided the requisite number of creditors concur, and there is no informality in the deed. No objection has been made in this case to the validity of the deed, and I think, therefore, that the order of the Commissioner must be reversed.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion. With the greatest deference to the learned Commissioner, it appears to me that taking it, as we must take it, that in this case the deed is in all respects regular, the consequence is, that it is binding on every creditor just as if he had himself signed and sealed it. Then the Act says that the creditor is not to issue execution without leave of the Court. Surely, a Court of equity would not give leave to issue execution under such circumstances. That seems to me the whole case.

The order must be reversed, and the Respondents must pay the costs of the appeal, as well as before the Commissioner.

Solicitors for the Appellant: Messrs. *Taylor, Hoare, & Taylor.*
Solicitor for the Respondents: Mr. *H. M. Phillips.*

In re CONTRACT CORPORATION.

L. JJ.
1866
Nov. 8.

Winding-up—Amount of Call—Companies Act, 1862, *s.* 102.

The 102nd section of the *Companies Act*, 1862, does not oblige the Court to put off making a call until the claims made against a company which is in course of winding-up have been established as debts.

The Court of Appeal will not, unless a strong case is made, interfere with the discretion of the Judge to whose Court the winding-up is attached, by reducing the amount of a call ordered by him.

Order of *Stuart*, V.C., affirmed.

THIS case came before the Court on motions by several contributories of the *Contract Corporation Limited*, to discharge or vary an order made by Vice-Chancellor *Stuart* for a call of £30 per share.

L. JJ. 1866 *In re* CONTRACT CORPORATION.

The company was established in January, 1864, for the purpose of undertaking the construction of railways and other similar large works. The nominal capital was £2,000,000, divided into 20,000 shares of £100 each. £10 per share had been called up, and paid on most, if not all, of the shares. In or about March, 1866, a further call of £5 per share was made, but was paid only on a small proportion of the shares. The company shortly afterwards stopped payment, and on the 21st of April a winding-up order was made.

The company, at the time of its stoppage, appeared to have hardly any available assets, and the claims against it amounted to more than £850,000, nearly the whole being upon negotiable instruments, indorsed or accepted on behalf of the company. None of these claims had yet been established as debts.

The official liquidator applied for an order for a call of £30 per share. He deposed that 5803 shares belonged to two persons whose affairs were being wound up under a deed of arrangement; that 5680 were held by persons who were on the list of contributories, and that the liability of the holders of the remainder was disputed. He deposed further that he fully believed that claims would be established to the extent of more than £400,000, and that, having regard to the probability that some of the shareholders would be found unable to pay, a call of £30 at least was required. A gentleman, who had been the solicitor of the company, also deposed to his belief that at least £400,000 would be established against the company. It was not in dispute that the call could only be expected to produce about £180,000.

Vice-Chancellor *Stuart*, in vacation, on the 7th of September, 1866, made an order for a call of £30 per share, from which several of the contributories now appealed.

The official liquidator was called upon by the Court to attend, and, in reply to questions from their Lordships, he stated, that he thought it extremely probable that debts would be established to the extent of £600,000, and was satisfied that they would not be less than £400,000.

Mr. *Jessel*, Q.C., and Mr. *Davey*, in support of the appeal motion of *Joseph Boyer* and other contributories:—

The case is obviously one of extreme suspicion. During the brief

existence of the company £200,000 and more of paid-up capital has disappeared, and acceptances have been given to the enormous amount of £800,000 and upwards. The greater part of the claims on these acceptances will be disputed, as they in all probability arose through dealings by the directors which were *ultra vires*, it being impossible that this amount of debt can have been incurred in the prosecution of the business of the company. That about £50,000 worth cannot be disputed with any prospect of success we admit, but the official liquidator ought to give some reasons for saying that so large an amount as £400,000 is likely to be established. The 102nd section of the *Companies Act*, 1862, does not, we submit, warrant the making a call for the purpose of providing for disputed debts until their validity has been ascertained. A call of £30 per share will ruin many of the contributories, and ought not to be ordered without the official liquidator giving his reasons for supposing that so large an amount of debts will be established.

Mr. *Bagshawe*, in support of the motion of other contributories.

Mr. *Crouch*, for *Arthur John King*, another contributory.

Mr. *Selwyn*, Q.C., and Mr. *Swanston*, for the official liquidator, were not called on.

SIR G. J. TURNER, L.J.:—

I do not think that any order can be made upon these motions. The effect of what has been done is, that a call of £30 a share is made upon the shareholders of this company. That call, as it is admitted on the part of the persons who are moving to postpone it, will not produce more than £180,000. Now there are claims against this company to the amount of £850,000 at the least, of which £50,000, according to Mr. *Jessel's* statement, is clearly established as a debt of the company. That leaves £130,000 to answer claims to the amount of about £800,000. It is said that these claims will be contested, and no doubt a great number of them may; but does it follow that because debts may be contested a call is not to be made to provide the means of paying them if, upon a contest, they should be established? It must always be

L. JJ. 1866 *In re* CONTRACT CORPORATION.

borne in mind in these cases what position the Court holds with reference to the claims of creditors. Creditors cannot sue without the leave of the Court, and the Court would be placed in a position of great difficulty, if it should refuse to the creditor the right to proceed at law for the payment of his debt, not at the same time providing any means to pay it in the event of his establishing it. It must be borne in mind also, that a change of circumstances, either intentional or unintentional, may take place in the position of every one of the contributories of these companies; and it seems to me, therefore, that unless the Act precludes us from making a call until debts are established or liabilities proved, it is the duty of the Court to make a call for the purpose of providing a fund for the payment of the debts. It is argued, on the 102nd section of the Act, that no call can be made until debts or liabilities have been established. Such is not my opinion. I think that the intention of that section was to provide the means of paying the debts whenever they might be established. I think so, for this reason among others, that the section empowers a call to be made immediately after the making of the winding-up order—a time when it clearly cannot have been ascertained whether or not the debts will be established, or what the debts will be. I think, therefore, the true view of the section is, that where it speaks of debts and liabilities, it must be taken to mean estimated debts and liabilities. Great caution and great care ought, no doubt, to be exercised by the Court in working out the provisions of this Act of Parliament; and if there were reasonable ground to suppose that debts would not be established against the company to the amount which is to be raised by this call, the Court might be inclined not to make a call of so large an amount. A very strong case, however, must be made before we should feel justified in reducing the call, for the official liquidator, who stands now in the character of an officer of the Court, and whose duty it is to take a fair and proper view, and make a just estimate of the amount of the liabilities of the company, informs us that, in his opinion, an amount of debts will be established against the company such as to make a call of at least this amount necessary. I think we are bound to place confidence in his statement. To call upon him in every case to state the

grounds on which he thinks the debt of one person may be established and the debt of another may be rejected, would be one of the most prejudicial courses of proceeding which could possibly be taken. Upon these grounds I think we cannot interfere in this case to reduce the call of £30 per share.

SIR H. M. CAIRNS, L.J.:—

I quite concur. I only wish to add this, that, as it appears to me, a Court of Appeal ought to be very cautious about interfering in a case of this kind. The question is, what is the proper amount of call to be made for the purposes of the company which is being wound up. Now I quite think that if any error has been committed as to the mode of making or ascertaining the amount of the call, the error ought, if possible, to be corrected by the Court of Appeal; but, to a very great extent, the *quantum* of call must be a matter that is to be left to the discretion of the Judge who has the conduct of the winding up of the company from first to last. In the course of the winding up of one of these companies, the Judge to whose Court the winding-up is attached must have before him matters material in guiding the exercise of his discretion, which cannot possibly be brought before the Court of Appeal. At first I was struck with the argument that the Act of Parliament contemplated that calls should be made only for the purpose of paying ascertained debts, and that, therefore, a call ought not to be made except for payment of debts already ascertained; but upon the construction of the Act of Parliament I entirely agree with the Lord Justice, that although the clause provides that the call is to be made to pay debts, it by no means follows that you are to wait until all the debts are ascertained and reduced to certainty before a call is made. I think, therefore, it is quite *intra vires* for the Court to make this call. As far as discretion is concerned, if we were disposed to review the discretion of a primary Judge in a matter of this kind, it seems to me that that discretion has not been improperly exercised. Looking to the magnitude of the demands against the company, demands not made without, at all events, some colour of right, because they are all made on negotiable instruments; looking to the magnitude of the demands, and to the sum that, it is stated, may

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be recovered by this call, and to the other debts of the company, about which there is no dispute that they will have to be paid, I do not think the call is too large for the purposes required. I think, therefore, that these motions should be dismissed with costs.

Solicitors for the Official Liquidator: Messrs. *Linklaters & Co.*
Solicitors for *Boyer* and others: Messrs. *Willoughby & Cox.*
Solicitors for *Bowerbank* and others: Messrs. *Edwards, Layton, & Jaques.*
Solicitors for *A. J. King*: Messrs. *Harcourt & Macarthur.*

L. JJ. 1866 Nov. 3.

PELL *v.* NORTHAMPTON AND BANBURY JUNCTION RAILWAY COMPANY.

Injunction—Railway Company—Unpaid Purchase-money.

A railway company, by agreement with a landowner, were let into possession of land which they required for part of their line, and made their railway over it, giving a bond for payment of the purchase-money on a future day. Default was made in payment of the bond:—

Held, that the landowner was not entitled to an injunction to restrain the company from continuing in possession until the purchase-money was paid.

Whether the landowner might not be entitled to a receiver, or to have the purchase-money paid into Court—*Quære.*

Order of the Master of the Rolls affirmed.

THIS was a motion by way of appeal from the refusal of an injunction by the Master of the Rolls.

In 1863 an agreement was entered into between the Plaintiff and the promoters of the *Northampton and Banbury Junction Railway Company*, by which, among other things, it was provided, that when the company required to take certain lands of the Plaintiff they should pay him as compensation the sum of £2000, to be paid in cash, or, at the option of the company, in such securities, bearing £5 per cent. interest, as should be agreed upon between the parties, or, failing agreement, as should be settled by *J. H. Lloyd.*

After the formation of the company, disputes having arisen, and the company having entered upon the Plaintiff's land mentioned in the agreement, the Plaintiff filed a bill for specific performance, and an injunction was applied for to restrain the company from continuing in possession. Ultimately, on the 30th of June, 1864, the company gave the Plaintiff their bond for £2000, payable on the 16th of June, 1866, and were let into possession of the land.

When the bond became due the Plaintiff applied for payment, but the company declared their inability to pay. They had never paid any interest on the bond in the meantime. The railway had been made and opened over the land in question.

The Plaintiff, upon the refusal of the company to pay, filed his bill against them, praying that they might be restrained from continuing in possession of, or entering upon, passing over, or using, the Plaintiff's land, until they had paid him the £2000 and interest; that it might be declared that the Plaintiff had a lien on the land for the money, and that such lien might be enforced; and that the agreement of March, 1863, might be specifically performed, and this bill, so far as necessary, be considered as supplemental to the former.

The Plaintiff moved for an injunction according to the prayer of his bill, and the motion, on the 5th of July, was refused by the Master of the Rolls.

Mr. *T. C. Wright*, for the appeal motion, relied on *Cosens v. The Bognor Railway Company* (1) as governing the present case.

Mr. *F. Waller*, for the Defendants, was not called upon.

SIR G. J. TURNER, L.J.:—

If the company were destroying the property, the Plaintiff might be entitled to an injunction; but he has let them into possession, and they are only using the land for the very purpose for which he sold it to them. The Plaintiff may, perhaps, be entitled to a receiver, but I do not think that he is entitled to such an injunction as he asks.

(1) Law Rep. 1 Ch. 594.

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SIR H. M. CAIRNS, L.J. :—

It appears inconsistent in a suit for specific performance to apply to turn the purchaser out of possession. It would seem more proper to apply to have the money paid into Court.

The appeal motion was accordingly refused, the costs being made costs in the cause.

Solicitors for the Plaintiff: Messrs. *Dale & Stretton.*

Solicitors for the Defendants: Messrs. *Gregory, Champion, & Eady.*

L. JJ. 1866 *Nov.* 8, 20, 21.

DUDDELL *v.* SIMPSON.

Vendor and Purchaser—Conditions of Sale—Right to Rescind.

Where a sale takes place under a condition providing that if the purchaser makes any requisition which the vendor is unable or unwilling to comply with, the vendor may, by notice in writing, annul the sale, the vendor may, if the purchaser insists upon a requisition, after being informed that the vendor is unable to comply with it, rescind the sale by notice, and such notice need not give the purchaser a time within which to waive his requisition.

A vendor entitled to an underlease for a term of twenty-four years, less three days, put up the property for sale, as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur. They afterwards refused to concur :—

Held, that the vendor could not be considered to have made a misrepresentation, so as to disentitle him to the benefit of the above condition.

Decree of *Stuart*, V.C., varied.

THIS was an appeal by the Defendant from so much of a decree of Vice-Chancellor *Stuart* as related to *Drayton Villa*. The case is reported (1), but, owing to the turn the argument took on appeal, it is thought desirable to state the facts.

The bill was for the specific performance of two contracts for the purchase of two separate properties, *Drayton Villa* and *Foley Villa*, which had been sold by auction to the Plaintiff. The particulars

(1) Law Rep. 1 Eq. 578.

of sale described *Drayton Villa* as being freehold, with the exception of some portion of it, "which portion is held for an unexpired term of twenty-four years, from the 29th of September next, at a nominal rent of ten guineas per annum." The tenth condition stated the vendor to be a mortgagee under a power of sale, and provided that the concurrence of the mortgagor should not be required; and that no purchaser should be entitled to any other covenant than several covenants by the vendor and other conveying parties (if any) that they respectively had not incumbered. Condition 11 provided that if, from any cause whatever, the purchase should not be completed on the 2nd day of August then next, the purchaser should pay interest at £5 per cent., and should not be entitled to any compensation for the vendor's delay or otherwise.

The 13th condition was in these terms: "If the purchaser shall insist on any objection or requisition as to the title, or abstract or evidence of title, particular, conditions, conveyances, or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor may, by notice in writing, to be given to the purchaser or his solicitor at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, cost of investigating the title, or other compensation or payment whatever."

The Plaintiff became the purchaser of both properties at the auction, on the 12th of July, 1864.

Upon the abstract being delivered, an objection was taken on the part of the purchaser, that the portion of *Drayton Villa* which was not freehold was not, in fact, held for a term of twenty-four years, but was held only for a term of twenty-four years, less three days, and those three days were outstanding in other parties.

It appeared that the three days were outstanding in a Mr. *Smart*, the trustee of the marriage settlement of a Mr. and Mrs. *Clark*. Before issuing the particulars, the vendor had communicated with Mr. *Smart* and Mr. *Clark*, who expressed their willingness to concur in the sale. The vendor's solicitors accordingly replied to the purchaser's objection that the persons in whom the three days were vested would join in the conveyance. A draft

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conveyance was accordingly prepared, to which Mr. *Clark* and Mr. *Smart* were made parties. The vendor's solicitors approved it on behalf of the vendor and Mr. *Clark*, and it was approved on Mr. *Smart's* behalf by another solicitor. An appointment was made to complete, but was put off, by a letter of the 21st of February, 1865, on the ground that Mr. *Clark* had not executed the conveyance.

On the 1st of March, 1865, the Plaintiff filed his bill, alleging that the vendor had promised to obtain the concurrence of Mr. *Clark* and Mr. *Smart*, and that the purchase deed had been prepared accordingly. And it prayed that the conveyance which had been prepared might be executed, and the matter completed on that footing. An answer was called for, and on the 22nd of April the Plaintiff's solicitors wrote to the Defendant's solicitors, stating that they should execute a writ of attachment for want of answer unless some satisfactory statement were made to them on the part of the vendor. On the 24th of April the vendor's solicitors replied as follows:—

"We have made every effort to induce Mr. *Clark* to concur in this deed, and thus avert further costs; and we had hoped to succeed. Not having done so, will at once put the answer in, and will thank you to give us until Thursday next for that purpose. Mr. *Simpson* is not to blame in the matter, and we feel assured that, with the undertaking we now give you, you will not think of causing him personal annoyance by lodging the attachment."

It appeared that Mr. *Clark* had refused to execute the conveyance, and changed his solicitors, and that Mr. *Smart* refused to execute unless Mr. *Clark* did, so that the vendor, after making every effort, could not procure the concurrence of either. And the vendor's solicitor deposed that, at several interviews, he had informed the Plaintiff's solicitors of this state of circumstances, but that the Plaintiff's solicitors never intimated any inclination to dispense with Mr. *Smart's* concurrence.

The Plaintiff not having intimated any intention to waive his requisition, the vendor, on the 27th of April, served him with a notice, in writing, annulling the sale, under the 13th condition. This notice was delivered by Mr. *Pawle*, one of the Defendant's

solicitors, to Mr. *Dubois*, one of the Plaintiff's solicitors, and Mr. *Pawle* thus deposed as to what took place on that occasion:—

"At that interview I expressed to Mr. *Dubois* my extreme regret that the matter could not have been settled amicably, and also what I considered to be the folly of the requisition with regard to the three days having been insisted upon, more especially as we had offered Mr. *Simpson* indemnity against any risk; to which Mr. *Dubois* replied, that their Counsel had advised them not to waive such requisition, adding that he would not waive the same, as they feared being involved in litigation with Mr. *Clark*, or words to that effect."

On the 8th of May the Plaintiff's solicitors wrote, offering to waive the requisition and complete, on payment of costs by the Defendant; and on the 27th they wrote, offering to waive the requisition and complete, dismissing the bill without costs. The Defendant insisted on his notice, as annulling the contract.

On the 22nd of June the Plaintiff amended his bill, offering to waive the concurrence of the persons entitled to the three days.

The cause was heard by Vice-Chancellor *Stuart*, who decreed specific performance, with costs, as to both *Drayton Villa* and *Foley Villa*, and directed an inquiry as to damages sustained by the Plaintiff in consequence of the delay.

The Defendant appealed from so much of the decree as related to *Drayton Villa*.

Mr. *Bacon*, Q.C., and Mr. *Begg*, for the Appellant:—

There was a clear insisting on a requisition with which the vendor was unable to comply, and that, after notice that the vendor was unable to comply with it. The purchaser uniformly insisted on it till after the notice to rescind had been given, and the contract, therefore, was effectually rescinded, and could not be set on foot again by any subsequent waiver.

Mr. *Malins*, Q.C., and Mr. *Amyot*, for the Plaintiff:—

The cases shew that a vendor does not, by a condition of this nature, acquire an arbitrary power of rescinding the contract:

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Greaves v. *Wilson* (1); *Nelthorpe* v. *Holgate* (2); *Painter* v. *Newby* (3); *Page* v. *Adam* (4); *Turpin* v. *Chambers* (5); *Hoy* v. *Smythies* (6): *Dart's* Vendors and Purchasers (7). They all shew that under such a condition the vendor must give the purchaser an opportunity of considering whether he will waive his requisition, after the inability, or reasonable unwillingness to comply with it, has been made known to him. The notice, therefore, ought to have given the purchaser a time within which to waive his requisition, as in the cases as to giving a notice to rescind after unreasonable delay, *e.g. Benson* v. *Lamb* (8). But, in fact, the condition does not apply in the present case, the vendor having misrepresented the nature of the interest he had to sell: *Hoy* v. *Smythies* (6).

Mr. *Bacon*, in reply:—

There is no authority in support of the proposition that the notice, under a condition of this nature, must give further time. It is opposed to the terms of the condition, and the cases as to making time of the essence of the contract by notice have no bearing, for they do not depend on contract.

SIR G. J. TURNER, L.J., after stating the facts, continued:—

The conditions of sale give power to the vendor to annul the contract if the purchaser shall insist upon any objection or requisition which the vendor is unable or unwilling to comply with. I quite agree with the argument that there is a great difference between taking an objection and insisting upon an objection, and that, in order to entitle the vendor to annul the contract, it is necessary for him to shew that the purchaser insisted upon the objection. The condition speaks of an objection or requisition which the vendor shall be unable or unwilling to remove or comply with. The question of unwillingness does not arise in the present case, because it is impossible, upon the evidence before

(1) 25 Beav. 290. 4 Jur. N.S. 271.
(2) 1 Coll. 203.
(3) 11 Hare, 26. 17 Jur. 489.
(4) 4 Beav. 269.
(5) 29 Beav. 104. 7 Jur. N.S. 439.
(6) 22 Beav. 510. 2 Jur. N.S. 1011
(7) 3rd ed. p. 102 4 Eq. 45-6
(8) 9 Beav. 502.

us, to say that the vendor ever exhibited any unwillingness whatever to remove the objection. I only refer, therefore, to the question of unwillingness because several cases bearing upon it have been cited before us. Those cases have settled, and, I think, very wisely settled, that the word unwilling, in a condition of sale of this description, is not to be considered as giving an arbitrary power to the vendor to annul the contract. I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must shew some reasonable ground for unwillingness; thus, for instance, he may shew that if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expense which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract. But to say that a vendor, upon a condition of that description, could annul a contract *brevi manu*, without attempting to answer any of the requisitions which are made on the part of the purchaser, would be opposed both to principle and authority; for that would, in truth, be giving to the vendor the power of saying that that which was intended as a sale, and was a sale, shall, in truth, be no sale at all.

Here, however, as I have said, we have nothing to do with the question of unwillingness. The question turns upon inability. It is contended on the part of the Plaintiff that the Defendant cannot avail himself of his inability under the condition, because there was a misdescription in the particulars of sale. I do not, however, think that there was any misdescription, considering that the vendor had, before the particulars of sale were issued, communicated with the parties who had the interest of the three days, and they had agreed to join in the conveyance, so as to give the purchaser the whole of the term described in the particulars. I think, therefore, that the case of misdescription may be left out of the question.

Another ground relied upon was, that the notice ought to have given time to the purchaser to determine whether he would or would not waive the objection which he had taken, and that the contract could not be well determined by a notice without such time being allowed. But I do not find any such stipulation in

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the conditions of sale. To lay down a rule that the vendor must give notice before he determined the contract, would be, in effect, to introduce into the condition a new term, that the vendor may annul the contract by a notice in writing, to be given to the purchaser, allowing so many days to the purchaser to determine whether he will waive the requisition. The purchaser, of course, perfectly well knows, according to the terms of these conditions, that the vendor has reserved to himself the power of annulling the contract without allowing him time for the purpose; and I do not know any principle on which this Court can vary the contract, and say that time shall be allowed. Mr. *Malins* referred, in his argument, to the cases between vendors and purchasers, where notice is given that the purchaser will treat the contract as at an end unless the vendor removes objections within a certain time. That is a question wholly independent of contract, the object of the notice being to exclude the equity of the Court for specific performance quite independently of the contract between the parties. Those cases, therefore, have no bearing on the present.

I am, therefore, of opinion, that the purchaser in this case was wrong in insisting upon the completion of the contract as to *Drayton Villa*, after the notice of the 27th of April, 1865, had been given, and I think that the decree of the Vice-Chancellor cannot be maintained, but must be varied so as to direct specific performance as to *Foley Villa* only. The inquiry as to damages must be struck out, for there is no case of damage as to *Foley Villa*, nothing more being alleged than that the property has not been let; and if the purchaser had wished to have it let, he should have applied to the Court in some different shape for that purpose.

There remains only the question of the costs of the suit. I think that the Plaintiff was right at the time when this suit was instituted, and up to the time when the notice of the 27th of April, 1865, was given; but, in my opinion, he was plainly wrong in going on with the suit after that notice had been given. I think, therefore, that the right order as to the costs is, that the Defendant, the vendor, should pay the costs up to the 28th of April, and the Plaintiff the subsequent costs. There will be no costs of the appeal.

SIR H. M. CAIRNS, L.J.:—

I entirely concur. The question arises upon the 13th condition of sale. Now, it appears to me that, upon the construction of that condition, there are four matters which must concur before there is a right to give a notice to rescind the contract. First, there must be an objection to the title; secondly, there must be an inability or unwillingness on the part of the vendor to remove that objection; thirdly, there must be a communication to the purchaser of the existence of this inability or unwillingness; and fourthly, there must be an insisting by the purchaser on his objection, notwithstanding this communication.

Now we may put out of the case here the first and the second, because it is common ground that there was an objection, and that there was inability to remove the objection. The remaining question, therefore, is a question of fact. Was there, in the first place, a statement of this inability to the purchaser? and was there then an insisting by the purchaser on his objection? If those two matters of fact existed at the time when the notice to rescind the contract was given, that notice had, in my opinion, the effect of rescinding the contract, and nothing that was done afterwards on the part of the purchaser, no waiver subsequently on his part of the objection on which in the first instance he had insisted, would restore the contract, which, according to the hypothesis I have made, would have come to an end, and been wholly incapable of performance from that time. Now, how stand the facts? Was there first a statement to the purchaser of the inability of the vendor to remove the objection? The objection was, that the concurrence of Mr. *Clark* was necessary to the purchase deed. Now, I do not think there can be any doubt, and indeed, as I read the affidavit of the Plaintiff himself, or of his solicitor, I do not understand that there was ever any doubt that the letter of the 24th of April communicated to the purchaser the fact that the concurrence of Mr. *Clark* need no longer be expected to be obtained. Then, in the face of this, was there, or was there not, an insisting on his objection on the part of the purchaser? It seems to me that, upon two occasions, in the most clear and distinct manner, the purchaser insisted upon it. A bill had been filed for specific performance on the 1st of March.

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That bill stated, as the fact was at the time, that the vendor had promised to obtain the concurrence of Mr. *Clark*, and that the purchase deeds had been prepared on the footing of Mr. *Clark* joining in them, and the bill alleged that the only objection to the title remaining to be cleared up was the obtaining the assent of Mr. *Clark*, and it prayed that the purchase deeds which had been prepared with Mr. *Clark's* name as a party might be executed, and the purchase completed on that footing. It was to that bill, then, an answer was called for. It was with reference to that bill that, on the 22nd of April, in order to obtain an answer, the solicitors of the Plaintiff stated that they had prepared a writ of attachment, and would execute it unless some satisfactory statement was made to them on the part of the purchaser. On the 24th of April, therefore, when the letter to which I have just now referred was written, it appears to me that the position of the parties was this:—The purchaser was, by the bill which he had put on the file, and to which he was calling for an answer, continuing to insist on the concurrence of Mr. *Clark*. He was doing so every moment that the bill remained on the file and an answer was called for to it after the letter of the 24th of April, because, I take it that leaving that bill as it stood, and calling for an answer to that bill as it stood, was equivalent to saying:—Notwithstanding that you have informed me that Mr. *Clark* will not concur, I require you to answer the bill that I have filed, which is a bill calling for and requiring the concurrence of Mr. *Clark*.

But the matter does not rest there. On the 27th of April, a notice rescinding the contract was given, but that notice was delivered in person to the solicitors, or to one of them, of the purchaser, and at the same time a tender was made to that solicitor of the deposit which had been received, and the statement which we have in evidence is this. [His Lordship read Mr. *Pawle's* evidence, as given above.] Then it was after that statement from Mr. *Dubois* that the meeting terminated, leaving the notice rescinding the contract in the possession of Mr. *Dubois*. Now, if either on the 24th of April or on the 27th of April the purchaser had desired to waive his objection, and had said, in the first case, on the 24th of April, "The suit need no longer go on, because we give up what we were insisting on with regard to Mr. *Clark*," or if Mr. *Dubois*

had said on the 27th of April, "My client will waive the objection with regard to Mr. *Clark*, and therefore I refuse your tender, and refuse your notice," it appears to me that the case would have stood in a wholly different position, and that there would then have been a right on the part of the purchaser to say that he had not insisted on his objection, and therefore the contract could not have been rescinded. But, from the facts I have stated, without going into the further matter which is raised on the affidavits as to parol conversations on days which are not specifically mentioned, it appears to me that there was clearly that insisting on the objection which I have just said seems to me to be the fourth ingredient required by the conditions of sale. If that be so, the contract was at an end. The suit may have been, and I think that it was, well founded up to that time, because there had been a promise to obtain Mr. *Clark's* concurrence; but it seems to me that, from that time, in the amending of the bill, and the subsequent litigation, the Plaintiff was wrong and the Defendant was right, and therefore I entirely concur in the alteration of the decree that my learned brother has just mentioned.

Solicitors for the Plaintiff: Messrs. *Brooks & Dubois.*
Solicitors for the Defendant: Messrs. *Pawle & Lovesy.*

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Nov. 9, 10, 11, 12, 13; *Dec.* 4.

COOPE *v.* CRESSWELL.

Debt—Covenant—Fraudulent Devises, Statute of—3 *Wm. & M. c.* 14—*Equitable Estate—Alienation—Statute of Limitations*—3 *& 4 Will.* 4, *c.* 42—*Payment by Party liable.*

E. covenanted that he, in his lifetime, or his heirs, executors, or administrators, within three months after his death, would pay a sum of £3000.

He died, having devised certain real estate to trustees in trust for *T. E.* for life, with remainders over, and other real estate to the same trustees for payment of debts.

The trustees, under an order of Court, conveyed the estate to new trustees, *H.* and *T.*, who became the legal personal representatives of the testator, and *T. E.*, the tenant for life, mortgaged his estate:—

Held that, after the death of the covenantor, an action of debt would lie upon the covenant:

That the action would lie against the trustees under the will and the heir, by 3 Wm. & M. c. 14, s. 3, and execution would be thus obtained against the land; and that the conveyance to new trustees was not such an alienation as would, under s. 7, prevent the action; nor was the mortgage by the equitable tenant for life such an alienation, though, *semble*, a Court of equity would protect the mortgaged interest against execution:

That the same conclusions would probably be arrived at, even if the legal estate in fee had been outstanding at the time of the testator's will and death, inasmuch as the Act 3 Wm. & M. c. 14, makes the devisees of an equitable estate liable for debts:

That an admission in their answer that the testator was seised of the legal estate would not estop Defendants from proving the contrary:

Held also (reversing decree of *Kindersley*, V.C.), that payment within twenty years of interest on the £3000 by *H. & T.* was not sufficient, under s. 5 of the *Statute of Limitations*, 3 & 4 Will. 4, c. 42, to prevent that statute from being pleaded in bar by the equitable tenant for life, *T. E.*

THIS was a suit instituted by *R. Coope* and *W. Walker* on behalf of themselves and the other specialty creditors of *Estcourt Cresswell*, deceased, in order to have the sum of £3000 and interest raised out of certain devised estates of *Estcourt Cresswell*, and as a supplemental suit to one already existing for the administration of a part of his estate.

By an indenture of settlement, dated 13th of May, 1815, made on the marriage of his son, *Edmund Cresswell, Estcourt Cresswell* did for himself, his heirs, executors, and administrators, covenant,

promise, and agree to and with *Townsend* and *Carter* (the trustees of the settlement) in manner following (that is to say), that in case the marriage should take effect, the said *E. Cresswell* would in his lifetime, or the heirs, executors, or administrators of the said *Estcourt Cresswell*, would, within three calendar months next after his decease, pay, or cause to be paid, unto the said *Townsend* and *Carter*, their executors, administrators, or assigns, the sum of £3000, and would in the meantime, until the said sum of £3000 should be paid, pay, or cause to be paid, unto the said *Townsend* and *Carter* interest upon the said sum as therein mentioned.

The marriage took place, and new trustees of the settlement were from time to time appointed, the Plaintiffs *Coope* and *Walker* being the trustees when this suit was instituted.

Estcourt Cresswell was seised in fee simple of the reversion expectant on the death of the Rev. *T. Fry* in certain estates in the county of *Devon:* it was contended by the Defendants in this suit, but, as will be seen, was not held to be proved, that the legal estate in fee in these estates was outstanding in 1815, and up to the present time. *Estcourt Cresswell* was also seised in fee simple in possession of certain estates in the county of *Wilts* called the *Pinkney* estates. By his will, made in 1821, he gave and devised to *J. Pitt* and *C. Dewell*, and their heirs, his *Pinkney* estates upon certain trusts for sale, and upon trust out of the proceeds of the sales to pay all mortgages and incumbrances on the said estates, and all his other debts and funeral and testamentary expenses, and then to distribute the proceeds as in his will mentioned. And he gave and devised unto and to the use of the said *J. Pitt* and *C. Dewell*, and their heirs, his *Devonshire* estates, in trust for his grandson, *Thomas Estcourt Cresswell*, for his life, with remainder to his first and other sons successively in tail, with divers remainders over. And he appointed *J. Pitt* and *C. Dewell* executors of his will, and died in 1823.

J. Pitt and *C. Dewell* renounced probate, and refused to accept the devises, whereupon letters of administration of the estate and effects were granted to *R. H. Harrison* and *F. H. Thomas*, who were also appointed by the Court of Chancery trustees under the will; and by indentures of lease and release, dated in April, 1824,

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and made under the order of the Court, *J. Pitt* and *C. Dewell* conveyed unto and to the use of *R. H. Harrison* and *F. H. Thomas*, their heirs and assigns, the *Pinkney* estates and the *Devonshire* estates, to hold upon the trusts of the will.

In 1834, *Gregory* and *Pitt*, as mortgagees of *Thomas Cresswell*, a legatee under the will, who had agreed to accept a part of the *Pinkney* estates in satisfaction of his legacy, instituted the suit of *Gregory* v. *Cresswell*, praying for an account of the estates devised by *Estcourt Cresswell* for payment of his debts and of his personal estate, and for a conveyance of the estate so accepted, or payment of the legacy, but not asking any relief in respect of the *Devonshire* estates. Accounts were taken in this suit, and the personal estate was administered, and all the *Pinkney* estates were sold, and the proceeds were applied in payment of the debts of the testator, including amongst them some voluntary bonds; and it was stated in the will, and not disputed, that there remained only a small sum of personalty and a sum of about £5513 arising from a late sale of the remainder of the *Pinkney* estates.

Thomas Estcourt Cresswell, in 1846, mortgaged his life interest in the *Devonshire* estates to the Appellants, *Caldwell*, *Chilton*, and *Fuller*, the legal estate under the will still remaining in the trustees, *Harrison* and *Thomas*. *Estcourt Cresswell*, during his life, and after his death *Harrison* and *Thomas*, the administrators and the trustees under the will, had paid the interest accruing under the settlement of 1815 to *Coope* and *Walker*, the trustees, until the year 1849. Mr. *Fry*, the tenant for life of the *Devonshire* estates, died in 1860, and soon afterwards *Coope* and *Walker* filed the original bill in this suit as above mentioned, which was subsequently amended, and prayed an account of what was due to themselves and the other specialty creditors of the testator, and that the *Devonshire* estates, or a sufficient portion thereof, might be sold and the proceeds applied in payment of what was so found due, and that this suit might be treated as supplemental to *Gregory* and *Cresswell*.

The Vice-Chancellor *Kindersley*, on the 24th of March, 1866, made a decree establishing the charge of the Plaintiffs on the *Devonshire* estates. The case is reported (1).

(1) Law Rep. 2 Eq. 106.

Caldwell, Chilton, and *Fuller,* the mortgagees of the life estate of *T. E. Cresswell,* appealed.

Mr. *Baily,* Q.C., Mr. *E. F. Smith,* Q.C., Mr. *Eddis,* and Mr. *Kingdon,* for the Plaintiffs, contended that an action of debt could be maintained upon this covenant, and therefore this claim was good against the devisee under 3 & 4 Wm. & M. c. 14: *Jenkins* v. *Briant* (1). The alienation could make no difference, as it was only of an equitable estate, the legal estate under the will being still in the trustees. There would certainly be an action of debt against the heir: *Tidd's* Practice (2); *Morley* v. *Morley* (3). As to the plea of the *Statute of Limitations,* interest was paid by the administrators and trustees up to 1849, and that prevented the statute from running: *Roddam* v. *Morley* (4); *Dickenson* v. *Teasdale* (5); *Chinnery* v. *Evans* (6).

Sir *R. Palmer,* Q.C., for the Appellants:—

1. There is no debt within the *Statute of Fraudulent Devises.* 2. The legal estate has been alienated. 3. The equitable estate has been alienated for valuable consideration. 4. *The Statute of Limitations* is a bar.

No action of debt will lie, but only an action of covenant. The covenant is, that one of three things shall be done, that the covenantor himself, that his heirs after his death, or that his executors or administrators, will pay. No action would lie against him in his life, nor against the heir, if the administrator paid, nor against the administrator if the heir paid: *Wilson* v. *Knubley* (7); *Farley* v. *Briant* (8); *Perrot* v. *Austin* (9); all shew that where a man covenants that his executors shall, after his death, pay a sum of money, there is no action of debt against them but only on covenant. So, if a man covenants in the alternative: *Wentworth's* Office of Executors (10); *Williams's* Executors (11); *Harrison* v.

(1) 6 Sim. 603.
(2) Vol. ii. p. 971.
(3) 5 D. M. & G. 610.
(4) 1 De G. & J. 1.
(5) 1 D. J. & S. 52.
(6) 11 H. L. C. 115.
(7) 7 East, 128.
(8) 3 Ad. & E. 839.
(9) Cro. Eliz. 232.
(10) Page 249.
(11) Vol. ii. p. 1563, 5th ed.

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Matthews (1). The circumstances in *Jenkins* v. *Briant* (2) were very different, and do not apply to this case. *Morse* v. *Tucker* (3) is also an authority. 2. The legal estate has been alienated by the trustees to the new trustees. We contend also, that the legal estate was outstanding at the time, and in that case trustees appointed by the testator had no estate at all, and the land in the hands of the equitable owner cannot be proceeded against. If a strict construction is put upon the statute of Wm. & M. only legal devisees are within its scope; if the language admits equitable devisees, then the persons to whom the estate really passes, and not the trustees, are the devisees within the meaning of the Act. The statute, in making heirs and devisees liable, does not follow the lands in the hands of an alienee. But if *Pitt* and *Dewell* were devisees within the meaning of the Act, they have conveyed to new trustees, who are neither heirs nor devisees. This reduces the idea of considering trustees to be fraudulent devisees within the meaning of the Act to an absurdity. But whatever may be the result of the conveyance to new trustees, sect. 5 contains a saving of land *bonâ fide* alienated, and this applies as much to equitable as to legal interests: *Spackman* v *Timbrell* (4); *Richardson* v. *Horton* (5). It is exactly like personal estate in the hands of a purchaser: *Dilkes* v. *Broadmead* (6). 4. As to the *Statute of Limitations*, the judgments which have followed *Roddam* v. *Morley* (7), have tended to diminish the authority of that case. The interest has been paid not by any one claiming under us, but by the administrators. It is true that these trustees were seised of the reversion in the *Devonshire* estates, but as there was a tenant for life in possession, it cannot be contended that interest was paid out of that estate. It must have been paid by them as administrators, but even if it came out of the *Pinkney* estates, that would not avail the Plaintiffs. Can any one contend that if a man devised large estates to some one, and a cottage to a gamekeeper, then a payment of interest by the gamekeeper at the end of nineteen years would keep a debt alive against the estates?

(1) 10 M. & W. 768.
(2) 6 Sim. 603.
(3) 5 Hare, 79.
(4) 8 Sim. 253.
(5) 7 Beav. 112.
(6) 2 Giff. 113. 6 Jur. N.S. 289
(7) 1 De G. & J. 1. 3 Jur. N.S. 449.

The argument on the other side, that payment by a tenant for life keeps a debt alive against a remainderman is irrelevant, for there is then no one else to pay the interest, and he represents the whole estate. Moreover, the Plaintiffs ought not to have lain by for so many years.

Mr. *Mellish*, Q.C., on the same side:—

In a suit of this kind the legal question decides the equitable, for there is no charge against the land itself, but only against the devisee or heir, on which execution is issued. It is true that the Court of equity will assist, but not unless an action could be maintained at law. Whether by mistake or not, the statute has confined the remedy to an action of debt, and as the executor would be liable to every action of debt, it is clear that the statute would not make him liable where he was not so before. Now, will an action of debt lie? Where a man covenants that he, his heirs, executors, or administrators, will pay, debt will lie. But if *A.* covenants that *B.* will pay, debt will not lie, only covenant. No action of debt will lie unless you can say that there has been a simple breach: *Vin.* Abr. (1); *Randall* v. *Rigby* (2). Under 11 Geo. 4, and 1 Will. 4, c. 73, you can sue the devisee without the heir; but this case is to be decided on the old law. Suppose an action of debt would lie. Against whom? Clearly not against any one not named as a devisee in the will, and an assignee of a devisee is not within the statute, therefore, the only action would lie against *Pitt* and *Dewell*, or against the testator's son, the tenant for life. Now each of these has conveyed his estate, and in either case the action is gone. It is impossible to put a rational construction on the Act, except by saying that the beneficial devisee is meant. If the trustee was meant, there would be a personal remedy against a trustee who had conveyed, in obedience to an order of the Court of Chancery, and yet if there is no action against the beneficial devisee and the action against the trustee is gone, how can the action lie?

Mr. *Schomberg*, on the same side, contended that there was evidence that the legal estate was outstanding, and that the payment

(1) Vol. vii. p. 329, "Debt," v. p. 2. (2) 4 M. & W. 130.

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of interest could not be held to come out of the *Devonshire* estates. The *Devonshire* estates were not touched by the suit of *Gregory* v. *Cresswell*, therefore nothing done in that suit could affect this claim.

Mr. *Dalton*, on the same side.

Mr. *Baily*, in reply:—

Even if a lessee has got rid of the term in his lifetime, the executor is charged in debt (1). *Jenkins* v. *Briant* shews that debt will lie, and if debt is brought against the heir or devisee, he cannot plead that the executor has assets: *Jeffreson* v. *Morton* (2). The heir is not charged as tenant, but as debtor: *Morley* v. *Morley* (3).

Where the heir has aliened *bonâ fide* for value, you cannot follow the estate, for he was bound to sell in order to pay the debts, but if he has aliened without value, the creditor can go upon the property: *Ex parte Morton* (4).

As to the question of the *Statute of Limitations*, the Judges and the Lord Chancellor, in *Roddam* v. *Morley* (5), are in our favour. That case is conclusive, and the dicta in *Dickenson* v. *Teasdale* (6), are not so.

Dec. 4. LORD CHELMSFORD, L.C.:—

The first question which arises in this case is, whether the Appellants, who are mortgagees of an equitable life estate devised by *Estcourt Cresswell* to his grandson, *Thomas Estcourt Cresswell*, are liable under the statute against fraudulent devises (7), upon a covenant by the devisor for payment of £3000 and interest.

The determination of this question depends upon whether an action of debt could or could not be maintained upon this covenant; for it was decided in the case of *Wilson* v. *Knubley* (8) that an action of covenant does not lie upon the statute of 3 Wm. & M. c. 14, against the devisee for breach of covenant, but that the remedy thereby given is confined to cases where debt lies.

Upon the covenant in question no action, either of covenant or

(1) 1 Wms. Saund. 241, d.
(2) 2 Wms. Saund. 7, b.
(3) 5 D. M. & G. 610, 621.
(4) 5 Ves. 449.
(5) 1 De G. & J. 1.
(6) 1 D. J. & S. 52.
(7) 3 Wm. & M. c. 14.
(8) 7 East, 128.

debt, could have been maintained against *Estcourt Cresswell* himself, because he covenants that he *or* his heirs, &c., will pay, and the covenant would be performed by payment, after his death, by his representatives, and therefore its performance could not be enforced during his lifetime. The form of the covenant gave occasion during the argument to consider the case of *Perrot* v. *Austin* (1), which is thus stated:—*A.* covenanted with *B.* to put his son apprentice to *C.*, otherwise that his executors shall pay *B.* £20. *B.* brought an action of debt against the executors of *A.*, and it was resolved by the Court that it lieth not, for two causes—1st. It cannot be a debt in the executors where it was not debt in the testator, and, it is added, "if one covenants to pay £10, debt lieth against him or his executors; but if he doth covenant that his executors shall pay £10, an action lieth not against them." It is clear from the context that in this latter case an action of debt is meant, and from the statement of the case in *Wentworth's* Office of Executors (2), it appears that the decision was merely as to the form of the action. But, even with this correction, the case of *Perrot* v. *Austin* cannot be supported, for in the case of *Ex parte Tindal* (3) it was held that, if a man covenants that his executors shall pay a sum of money after his death, this constitutes a debt just as much as if he himself had covenanted to pay it. But it was argued for the Defendants that, the covenant being that the covenantor, or his heirs or executors, would pay, there was no certain debt due from any of them, but that it was rather a covenant to do one of three things—viz., 1st, to pay in his lifetime; 2nd, that his heirs will pay; and 3rd, that his executors will pay. To this ingenious mode of putting the argument, the case of *Caldwell* v. *Becke* (4) appears to be an answer. There, upon a covenant in an indenture by the parties of the second part, that the parties of the first and second parts, or some or one of them, their or some or one of their executors, administrators, or assigns, would pay to the parties of the third part the sum of £250 and interest, it was held that an action of debt lay against one of the covenantors; and this case was distinguished from that of *Harrison* v. *Matthews* (5), where the

(1) Cro. Eliz. 232.
(2) Page 250.
(3) 8 Bing. 402.
(4) 2 Ex. 318.
(5) 10 M. & W. 768.

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Defendant alone covenanted that he and three other persons (named as parties to the indenture, but not being proved to have executed it), or some or one of them, would pay the Plaintiff £300 and interest, and it was held that the question must be treated as if the Defendant had covenanted that he and *J. S.*, a stranger, would pay, and that it was in substance and effect the same as a covenant to pay if *J. S.* did not, and therefore an action of debt would not lie upon it.

In the present case the covenant is absolute, and not conditional, that the covenantor, or his heirs or executors, should pay a certain sum, with interest in the meantime until payment. At the expiration of three months after the death of the covenantor, the £3000 became absolutely demandable as a debt due under the covenant, and an action of debt might have been brought by the trustees against either the heirs or the executors of the covenantor, without the necessity of averring in either case that the other representative had not paid. I cannot entertain the least doubt that an action of debt would lie in this case against the devisee of the estate under the statute against fraudulent devises.

But, assuming that the covenant in question is of such a description that an action of debt might have been maintained against a devisee, it is contended that the case is not within the statute, as the devisor, at the time of his death, was not seised in fee simple of the devised estate.

It was said, on the other side, that the Defendants were estopped from denying that the devisor had the legal estate by admissions made in their answer:—In par. 3, they say: "We believe that *Estcourt Cresswell*, the testator in the Plaintiff's bill named, was, at the time of making his will, therein mentioned, and thenceforward to and at the time of his decease, seised or entitled in fee simple of or to the reversion, subject only to the life estate of the Rev. *Thomas Fry*, of the manors, messuages, &c., called the *Devonshire* estate;" and the trustees named in the will of *Estcourt Cresswell* having refused to act in the trusts, and *Richard Hopkins Harrison* and *Francis Henry Thomas* being appointed by the Court to be trustees in their stead, and *Thomas* having survived *Harrison*, the Defendants, in par. 28 of their answer, referring to certain of the Defendants being made parties to the suit, say: "However, we submit

that if such several persons, or any of them, are or is so entitled in remainder as in the said bill mentioned, they are not necessary parties to this suit, as the said *Francis Henry Thomas* has the legal estate in fee, and the Plaintiffs ought to be ordered personally to pay all the costs of such last mentioned Defendants, except those of the said *Francis Henry Thomas*, as such trustee having the legal estate in him." These are the two passages in the answer which are said to estop the Defendants from disputing the seisin in fee of the devisor and the legal estate of the trustee, although the facts should be otherwise. I cannot think that these passages can have the force of an estoppel, so as to preclude the Defendants from proving the truth, if it were contrary to the statements contained in them; and they proposed to shew, by a deed of the 28th of September, 1772, that *Estcourt Cresswell*, at the date of his will, and at his death, had only an equitable estate in the *Devonshire* estates; but the proof entirely failed, for want of sufficient evidence of an admissible copy of the original deed, which was not forthcoming.

It is extremely doubtful whether, if the Defendants had succeeded in establishing the fact that the devisor had only an equitable estate, and consequently could pass only an estate of that description to his trustees and devisees, it would have been of any avail. The statute of Wm. & M. extends to cases of devisees, not only where the devisor is seised in fee, but where he has the power *to dispose of* the subject matter of the devise, which in terms includes every beneficial interest he may possess, and the devisee of an equitable estate seems to be made liable to an action of debt by the creditors of the devisor by the 3rd section of the Act, where the words "such devisee or devisees" can only refer to the 2nd section, which applies to devises of every description of estate, legal or equitable, and upon a judgment obtained in such an action execution may be taken out against the equitable devisee by the 10th section of the *Statute of Frauds* (1).

But, assuming that the creditors of a devisor might sue an equitable devisee, the Defendants contend that by the 7th section of 3 Wm. & M. c. 14, the estate in question would not be liable to execution, having been *bonâ fide* aliened to them by *Thomas Estcourt Cresswell*, the equitable tenant for life.

(1) 29 Car. 2, c. 3.

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There is some difficulty in determining the manner in which creditors are to sue under the 3rd section of the Act, where there is a devise by the debtor to one for life with remainders over; but I suppose, the action would have to be brought against the heir and all the devisees jointly. If the tenant for life had aliened before action brought, the remainders only would be subject to execution. In the same manner, if I am right in considering that equitable estates are within the statute, and supposing all the estates under *Estcourt Cresswell's* will, including that to the trustees, had been equitable, then the action would have been against *Thomas Estcourt Cresswell*, in his double character of heir and tenant for life, jointly with the persons entitled in remainder, and the mortgage to the Defendants, before action brought, would have prevented the execution from affecting the life estate. It must be taken, however, on the evidence before me, that the trustees under *Estcourt Cresswell's* will had the legal estate, and that they would have been the devisees against whom the action of debt must have been brought. For, under the statute, the liability attaches upon the land, and not upon the person, except in case of alienation; and, therefore, although the trustees are not liable to the debts of the devisor, yet the creditors may, through them, make the land available for the satisfaction of their debts. Upon a judgment obtained against the trustees, execution would, of course, extend to the whole estate. But if any beneficial interest in it had been *bonâ fide* aliened before action brought, I think this Court would, upon application being made to it, prevent the interest so aliened from being affected by the execution.

But the Defendants say that no part of the *Devon* estate could be liable to execution under the statute because it had been aliened by the devisees, the trustees under the will of *Estcourt Cresswell*, to *Harrison* and *Thomas*, the new trustees. I cannot think that any alienation of this kind is such an alienation as is intended by the statute, but only one which carries with it the beneficial interest. If it were otherwise, a very easy method of evading the statute and protecting the land would always be open, and a renunciation by the trustees to whom the legal estate is devised, and a conveyance of it to new trustees would

in every case render the liability of the devisee only a personal one.

There were some minor points raised in the argument, which were almost disposed of by the observations at the time, and which I pass by in order to consider the important defence to the bill which arises upon the *Statute of Limitations* (1).

The facts upon which this question turns are shortly these. *Estcourt Cresswell*, by his will, devised an estate called the *Pinkney* estate, to his trustees in trust to sell and apply the proceeds to the payment of debts in aid of his personal estate. The trustees named in the will having renounced (as already mentioned), and *Harrison* and *Thomas* having been appointed trustees in their stead, they took out letters of administration with the will annexed to the testator's estate, and became his legal personal representatives. The interest upon the £3000 which *Estcourt Cresswell* covenanted to pay to his son *Edmund*, in the marriage settlement of the 13th of May, 1815, was regularly paid by him during his life, and after his death, down to the year 1849, by *Harrison* and *Thomas*, in whom the *Pinkney* estate was vested, and who were also his personal representatives. And the question is, whether the payment of interest by these parties takes the case out of the *Statute of Limitations*, as to the Defendants, the mortgagees of the life estate of *Thomas Estcourt Cresswell*, more than twenty years having elapsed after the devise of that estate before the institution of the suit. The question turns upon the 5th section of the 3 & 4 Will. 4, c. 42, which is in these terms: "Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction as aforesaid."

There seems to be some reason for a difference being made between an acknowledgment and a part payment of principal or

(1) 3 & 4 Will. 4, c. 42.

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interest, with respect to the liability of persons other than the one making the acknowledgment or payment. In the case of an acknowledgment, its effect is confined to the person who makes it; but part payment is a benefit to all persons liable to the debt, as it relieves them from so much of their liability.

This might possibly account for the difference in the language of the statute between acknowledgment and payment, for, as observed by Baron *Parke*, in *Forsyth* v. *Bristowe* (1), the statute does not expressly require that payment shall be made by the party liable, or his agent. But it can hardly have been intended that any payment, even by a stranger, should be sufficient, and acknowledgment and payment seem to be intended to be placed on precisely the same footing; payment being treated as one species of acknowledgment by the words, "such acknowledgment by writing, or part payment, or part satisfaction as aforesaid." The question whether the *Statute of Limitations* furnishes a defence to the Defendants, must be determined by the meaning of the words, "by the party liable by virtue of such indenture, specialty, or recognizance, or his agent." As observed by the learned Judges in *Roddam* v. *Morley* (2): "The great difficulty in putting a construction on the language of the section, arises from the obvious fact, that the framers of it had in their mind the single case of a sole obligor, and that the case of a bond with several obligors, or of a deceased obligor, never occurred to them." If this remark is correct (as it appears to be), then the "party liable, or his agent," so far as the intention of the Legislature is concerned, must mean the individual making the acknowle lgment or payment. But no one has ever entertained a doubt that the Act extends to the case of a bond with several obligors, or to a covenant or recognizance by which several persons are bound. But it does not, therefore, follow that the words, "the party liable," in the 5th section, are to be read as if they were "the party or parties liable by virtue of the bond, &c., or any of them, or his, her, or their agent." And even if this expansion of the words might be allowable in the case of a joint obligation or covenant, it seems doubtful whether they would comprehend the case of persons whose respective liabilities stand upon such totally different grounds

(1) 8 Ex. 716, 722. (2) 1 De G. & J. 1.

as a devisee simply, a devisee for payment of debts, and a personal representative. At all events, the Judges, in *Roddam* v. *Morley* (1), instead of actually construing the Act, were obliged to add words in order to meet the presumed intention of the Legislature.

But is there anything unreasonable in supposing that they intended what their words literally express? and that in each case of an action brought, you are to look to the party whose liability is sought to be enforced, and who uses the *Statute of Limitations* as a defence. The whole frame of the section appears to point in this direction. In providing that absence beyond seas shall prevent the running of the statute, the words are "in case the party making such acknowledgment be at the time of making the same beyond seas," and the right of action is in terms kept alive only against him. Stress was laid upon this part of the section by the Vice-Chancellor in *Roddam* v. *Morley*, and the only answer to it by the Judges who assisted the Lord Chancellor upon the appeal was, "that the language of the section is obviously addressed only to a case where a single party is liable." To this it might be replied, that the case of more than one party being liable not being in the contemplation of the Legislature, no provision could have been intended to be made for it. But the Lord Chancellor stated that he did not feel the force of the objection arising from this part of the section, and remarked that neither of the two cases of *Fannin* v. *Anderson* (2), and *Towns* v. *Mead* (3), were brought under the consideration of the Vice-Chancellor, though they had a most important bearing on the question as to what would be the effect of an acknowledgment made abroad by one of several persons liable. But these decisions, which were both of them in cases where the Defendants had been beyond seas, proceeded upon the Act 4 Anne, c. 16, s. 19, alone, and not as the Lord Chancellor supposed, on the operation of that statute, and the Act of 21 James 1, c. 16, s. 7. The statute of *James* applies only to Plaintiffs being absent beyond seas; the statute of *Anne* providing for the absence abroad of Defendants. Now the words of the statute of *Anne* are totally different from those of 3 & 4 Will. 4, c. 42, and rather tend to fortify the view of the latter Act

(1) 1 De G. & J. 1. (2) 7 Q. B. 811.
(3) 16 C. B. 123.

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taken by the Vice-Chancellor. The 19th section of the 4 Anne, c. 16, enacts that if any person or persons against whom there shall be any cause of suit or action of a specified description, or any of them, be, or shall be, at the time of any such cause of suit or action given or accrued, fallen or come beyond the seas, that then such person or persons who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas. Now, contrast the words of this section, which expressly provides for the absence beyond seas of co-Defendants or any of them, with the language of the 5th sect. of the 3 & 4 Will. 4, c. 42, in case the party making such acknowledgment be at the time of making the same beyond the seas, then it shall be lawful for the person or persons entitled to such action, to bring his or their action within twenty years after the party shall have returned from beyond seas. The "party making such acknowledgment" is the "party liable by virtue of the indenture, specialty, or recognizance," previously mentioned, and it is to his absence beyond seas alone that the section can possibly relate. After a careful examination of the case of *Roddam* v. *Morley* (1), in which the Vice-Chancellor founded his judgment upon the defence of the *Statute of Limitations*, I am unable to concur in the reasoning which led to the ultimate decisions in that case. It is unnecessary for me to consider whether the parties, tenant for life and remainderman, are so united in interest, that payment by the one might be regarded as an acknowledgment of the debt by the other. This, I think, would undoubtedly have been the case if the bond debt had been a charge upon the land. But whether this were so or not, the relation between the parties in *Roddam* v. *Morley* renders that case totally inapplicable to the present. This was the opinion of Lord Chancellor *Westbury*, in the case of *Dickenson* v. *Teasdale* (2), where a similar question arose as to the effect of an acknowledgment by a devisee upon the defence of the *Statute of Limitations* by a co-devisee. In that case his Lordship shortly expressed the same view which I have taken upon this question, and I have therefore his authority in support of the conclusion at which I have arrived.

(1) 1 De G. & J. 1. 3 Jur. (N.S.) 449 (2) 1 D. J. & S. 52; 9 Jur. (N.S.) 237.

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The decree, so far as it affects the Defendants, who have appealed, must be reversed, and the bill, as against them, be dismissed, with costs. I say nothing as to the costs of the appeal.

Solicitors for the Plaintiffs: Messrs. *Price, Bolton, & Filder.*
Solicitors for the Appellants: Messrs. *Capron, Brabant, & Co.*

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Nov. 13, 14, 15, 16, 17, 19; *Dec.* 6.

*Practice—New Trial—*21 & 22 *Vict. c.* 27, *s.* 5—*Patent—Specification—Variance—Novelty.*

When a motion for a new trial is made before the Court of Appeal, the Court will not consider whether the finding was proper, but merely whether there was sufficient evidence to warrant the verdict.

Where the motion is grounded on the improper rejection of evidence, the evidence ought to have been formally tendered to the Judge of the Court below, and rejected by him.

A provisional specification, if allowed by the law officer of the Crown, cannot be impeached as being too general.

The complete specification must not claim anything different from that which is included in the provisional specification, but need not extend to everything so included.

The new application of any means or contrivance may be the subject of a patent, if it lies so much out of the track of the former use as not naturally to suggest itself, but to require some application of thought and study.

8 Eq. 364
5 H.L. 210
6 H.L. 447

THE bill in this case was filed by *John Penn*, of *Greenwich*, engineer, to restrain the Defendants from infringing his patent for "An improvement in the bearings and bushes for the shafts of screw and submerged propellers;" and he filed a similar bill in the suit of *Penn* v. *Jack*, which was heard at the same time, and on the same evidence.

The letters-patent were sealed on the 21st of November, 1854, and dated the 2nd of October, 1854.

The provisional specification was left on the 2nd of October, 1854, and was as follows:

"I, *John Penn*, of *Greenwich*, in the county of *Kent*, engineer, do hereby declare the nature of the invention for *an improvement in the bearings and bushes for the shafts of screw and submerged*

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propellers to be as follows: This invention consists of employing wood in the construction of the bearings and bushes for the shafts of screw and submerged propellers."

The complete specification, filed the 2nd of April, 1855, gave drawings shewing the shaft and bearings of a screw propeller, and said, "The inner surfaces of these bearings are grooved, to receive fillets of wood, which project to some extent beyond the inner surfaces of the metal bearings, so as to prevent the shaft coming in contact with the metal of the bearings, and these spaces admit of the water flowing freely between the shaft (B) and the inner surfaces of the metal bearing." . . . "The object of the invention is, that the parts of a propeller shaft which are within bearings shall not come in contact with metal of the bearings, but against pieces of wood, fixed therein in such manner as to admit of water flowing freely between the pieces of wood, and between the inner surfaces of the metal bearings and the outer surfaces of the propeller shaft." . . . "A like effect is obtained, if the pieces of wood (whether in the form of fillets or otherwise, or whether with the grain longitudinally, or at right angles with their bearing surfaces) be fixed to the shaft, and revolve therewith." . . . "What I claim is the employing of wood in the construction of the bearings and bushes for the shafts of screw and submerged propellers, as herein described."

By an Order made in this cause, dated the 20th of July, 1865, the Court directed that the following questions of fact be tried before the Court itself, without a jury (that is to say):—

1. Was the invention for which the letters-patent were granted new within the United Kingdom at the date of the said letters-patent?

2. Did the specification enrolled in pursuance of the said letters-patent particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed?

3. Was the alleged invention proper subject matter of a patent?

4. Have the Defendants infringed the patent?

It was stated at the bar that the trial took place without a jury, by consent.

The trial lasted five days, and on the 1st of May, 1866, the Vice-

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Chancellor *Wood* delivered judgment, and found in the affirmative on all the four questions.

The Defendants moved before the Lord Chancellor that a new trial might be had, or that the verdict upon the said issues, or some of them, might be entered for the Defendants, the motion being made under the practice introduced by 21 & 22 Vict. c. 27, s. 5.

Sir *R. Palmer*, Q.C., Mr. *Webster*, Q.C., and Mr. *E. E. Kay*, for the Defendants, in support of the motion, contended that the verdict as to the novelty of the patent was against the weight of evidence; inasmuch as a similar invention had been used many years ago on board a vessel called the *Livorno*: that there was a fatal variance between the provisional specification and the complete specification: that there was nothing novel in the invention, as wood had been used time out of mind for bearings; and that there had been an improper rejection of evidence.

The *Attorney-General* (Sir *John Rolt*), Mr. *Grove*, Q.C., Mr. *Cotton*, and Mr. *Aston*, for the Plaintiff, cited *Oxley* v. *Holden* (1); *Cook* v. *Pearce* (2); *Ralston* v. *Smith* (3); *In re Newall and Elliott* (4): *Thomas* v. *Welch* (5), as to the sufficiency of the specification: *Brook* v. *Astor* (6); *Horton* v. *Mabon* (7); *Harwood* v. *Great Northern Railway Company* (8); *Jordan* v. *Moore* (9), as to the validity of the patent in respect of novelty.

Dec. 6. LORD CHELMSFORD, L.C., after stating the circumstances, said, that the motion for a new trial upon the first question proceeded upon the ground that the verdict was against the weight of evidence. In dealing with the finding of the Vice-Chancellor upon this question of fact, his Lordship regarded himself as placed precisely in the situation of the Judges of the Courts of common

(1) 8 C. B. (N. S.) 666.
(2) 8 Q. B. 1044.
(3) 11 C. B. (N. S.) 471.
(4) 4 C. B. (N. S.) 269.
(5) Law Rep. 1 C. P. 192.
(6) 8 E. & B. 478.
(7) 12 C. B. (N. S.) 437; 16 C. B. (N. S.) 141.
(8) 11 H. L. C. 654.
(9) Law Rep. 1 C. P. 624.

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law when a rule is obtained to set aside the verdict of a jury. They do not consider what would be the proper view of the case if originally presented to them, but merely whether there is sufficient evidence to warrant the verdict, nor, in the course of his Lordship's experience, had he ever known an instance in which there was evidence on both sides, and the Judge who tried the cause was satisfied with the verdict, where a new trial was granted. His Lordship then said that the proof of want of novelty depended entirely upon the evidence in respect of a ship called the *Livorno*, and his Lordship came to the conclusion that, on the evidence, the Vice-Chancellor was justified in refusing to give credit to the case of the *Livorno*, and, consequently, finding in favour of the novelty of the invention.

His Lordship then continued:—The next finding is that the specification did particularly describe and ascertain the nature of the invention, and the manner in which it was to be performed. To this the Defendants object, and contend that the patent is void because there is a variance between the title and the specification, or between the provisional and the complete specification. It is said, on the part of the Plaintiff, that there is no issue to raise this question; and that the correct mode of tendering such an issue at law would have been either by plea of *non concessit*, or by expressly pleading the variance between the title and the specification. I think, however, that, with perhaps a little license of construction, the second issue may meet the case, as it may be said that the specification did not particularly describe and ascertain the nature of the invention, if the complete specification departed from the terms of the title, or of the provisional specification in which the nature of the invention must be described. I should, at all events, be very unwilling to shut out this objection, by deciding this point against the Defendants, and I shall therefore assume that the question of the invalidity of the patent is open to them upon the issues.

The objection urged by the Defendants may be thus stated. The Crown, in granting a patent, proceeds on the information contained in the provisional specification. The provisional specification in this case describes the nature of the invention, in the most general terms, to consist of employing wood in the construction of the bearings and bushes for the shafts of screw and submerged

propellers. The complete specification describes a particular mode of employing wood to prevent the parts of a propeller shaft, which are within the bearings, from coming in contact with the metal of the bearings, and to cause them to revolve against pieces of wood fixed therein in such a manner as to admit of water flowing freely between the pieces of wood, and between the inner surfaces of the metal bearings, and the outer surfaces of the propelling shaft. The claim at the end of the specification is, "the employing of wood in the construction of the bearings and bushes for the shafts of screw and submerged propellers as herein described." If the words "herein described," are to be disregarded, the patent is void, as the claim will then be for the employment of wood in every possible way in the bearing and bushes of propellers, and if these words limit the claim to the precise description in the specification, this is not what is described in the provisional specification, and the Plaintiff has therefore obtained a patent for one thing, and specified another.

This is the Defendant's argument; and it was also alleged that there is something beyond the provisional specification contained in the complete specification, the former being confined to the employment of wood in bearings and bushes, and the latter stating that the like effect is obtained if the pieces of wood be fixed to the shaft, and revolve therewith.

There can be no doubt that the claim in the specification must be read with the limitation produced by the words "herein described," and that the question thereupon arises, whether this occasions a departure from the provisional specification so as to render the patent void.

It is necessary, in order to determine the validity of this objection, to ascertain the different offices of the provisional, and the complete specification, which can only be done by reference to the *Patent Law Amendment Act*, 1852.

Before that Act, inventors were in the habit of applying for patents under titles of a most comprehensive description, so as to embrace the widest circle of the particular class of inventions proposed to be patented. The Legislature, no doubt with reference to this practice, enacted, by the 6th section of the Act, that with every Petition for the grant of letters-patent, there shall be left

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at the office of the commissioners a statement in writing called the provisional specification, describing the nature of the invention. And by the 8th section, the provisional specification is to be referred to the law officer, and if he be satisfied that it describes the nature of the invention, he is to allow the same, and by a proviso at the end of this section, in case the title of the invention, or the provisional specification, be too large or insufficient, it shall be lawful for the law officer to whom the same is referred to allow or require the same to be amended.

It seems clear from these sections that the office of the provisional specification is to describe the nature of the invention, not with minute particularity, but with sufficient precision and accuracy to inform the law officer what is to be the subject matter of the patent. It is not at all necessary that the provisional specification should describe the mode or modes in which the invention is to be worked or carried out. That is left to the complete specification, which, by sect. 9 of the Act, must not only describe and ascertain the nature of the invention, which, of course, must be no other than that described in the provisional specification, but also in what manner the same is to be performed, which is not at all required to be explained by the provisional specification. The filing of the provisional specification, by the express provisions of the statute, protects the invention for six months, and gives the patentee, during this term, the like powers, rights, and privileges, as might have been conferred upon him by letters-patent. The object of this protection evidently is, to enable the patentee to perfect his invention by experiments which, although open and known, will not be a user and publication to the prejudice of letters-patent to be afterwards granted, so that he may be in a condition to describe in his complete specification, as the result of his experience, the best manner of performing the invention. It clearly appears, therefore, that the complete specification is, in a sense, supplemental to the provisional specification, not going beyond nor varying from it as to the nature of the invention, but conveying additional information, which may have been acquired during the currency of the provisional specification, as to the manner in which the invention is to be performed.

From this description of the different offices of the two specifi-

cations, it follows that upon an issue whether the specification, enrolled in pursuance of the letters-patent, describes and ascertains the nature of the invention, if the claim in the complete specification is comprehended within the terms of the provisional specification, that issue will be satisfied. The relation which the provisional specification bears to the complete specification is much the same as that which, before the *Patent Law Amendment Act*, the title bore to the specification; and the observations of *Tindal*, C. J., in *Cooke* v. *Pearce* (1), are as applicable to the provisional specification now as they were to the title formerly. That learned Judge says: "The vagueness (he had previously spoken of the vagueness and generality) of the title appears to us to be an objection that may well be taken on the part of the Crown before it grants the patent, but to afford no ground for avoiding the patent after it has been granted. If such title did not agree with the specification when enrolled, or if there had been any fraud practised on the Crown in obtaining the patent with such title, the patent in those cases might undoubtedly be held void."

These remarks, as applied to the title of a patent, have a stronger application to the case of a provisional specification under the *Patent Law Amendment Act*, because the law officer, if he thinks the specification too large, can order it to be amended. And if no objection is made by him, the generality of the specification, to repeat the words of Chief Justice *Tindal*, affords no grounds for avoiding the patent after it is granted.

The only objection, then, which is open, is upon the complete specification, whether it is sufficient in itself, and whether it agrees with the provisional specification. Now, by agreement is not meant a perfect correspondence, but merely that there shall be nothing in the complete specification at variance with the provisional. This is exemplified by *Newall's Case* (2). There the provisional specification contained a description of the apparatus employed in laying down submarine electric telegraph wires. In the details it made no mention of the use of rings of iron to prevent the bight of the rope from flying out when going at a rapid speed. In the complete specification this addition to the description was introduced. It certainly might have been argued in that

(1) 8 Q. B. 1064.

(2) 4 C. B. (N. S.) 269.

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case, that although it was not necessary to state more in the provisional specification than the nature of the invention, yet if the inventor takes upon himself to go farther, and introduce a description of the manner of carrying it out, he thereby limits himself to that exact description, and the complete specification going beyond it rendered the patent void. But the Court of Common Pleas thought that all they had to look to was whether the provisional specification sufficiently described the nature of the invention in compliance with the statute, and that the not entering into a detail of all the means by which it was to be accomplished was immaterial.

Nor is it at all necessary that the complete specification should extend to every thing comprehended within the provisional specification. Perhaps a better illustration of this proposition could not be given than that which was offered in the course of the argument. If the patentee were to introduce into his complete specification everything which was warranted by the terms of the provisional specification, and afterwards found that a part of that which he had claimed would invalidate his patent for want of novelty, or for any other reason, he might afterwards cure the objection by a disclaimer. Now, if he would be allowed to disclaim in such a case, which is matter of indulgence, he must have a right to waive his claim to any portion of the grant which the allowance of the provisional specification had entitled him to demand.

It is clear, therefore, that unless the complete specification in this case claims something different from the provisional specification, the objection to the patent under consideration cannot prevail. But there is not the slightest foundation for the objection in point of fact, and each specification appears to me faithfully to fulfil its own office.

The provisional specification describes the invention as consisting of employing wood in the construction of the bearings and bushes for the shafts of screw and submerged propellers. The generality of the description (even if it were too general, which I doubt) we have already seen is not an objection which is now open. It has had the allowance of the law officer, and is safe from all question. Then does the complete specification exceed the proper limits in describing the manner of performing the invention? It

gives a detailed description, which has not been objected to as insufficient, shewing how the wood is to be arranged in the bearings, and then it states the object of the invention, that is, the result which will be obtained by following the description previously given. I am quite at a loss to perceive in what respect this portion of the specification is objectionable. But it was said that one part of the complete specification went beyond the provisional specification, and extended to something which could not be included in it, viz., the application of wood to the shaft so as to revolve therewith, the provisional specification in describing the nature of the invention confining the employment of wood to the bearings and bushes. If wood applied in this manner to the shaft may properly be called a bearing, then there is no excess in this part of the specification. But if, strictly speaking, this application of wood would not come within the description of a bearing, then the answer to the objection is, that it is not claimed, the claim being limited to the employment of wood in the construction of bearings and bushes. There is, therefore, no departure from the provisional specification in the complete specification, and the finding of the Vice-Chancellor upon this issue was right.

The third and last question raised here, was upon the finding that the invention was the proper subject matter of a patent.

To this it was objected that the finding is erroneous, because the alleged invention was merely a new application of an old and well-known thing. It is very difficult to extract any principle from the various decisions on this subject which can be applied with certainty to every case; nor, indeed, is it easy to reconcile them with each other. The criterion given by Lord *Campbell* in *Brook* v. *Astor* (1) has been frequently cited (as it was in the present argument), that a patent may be valid for the application of an old invention to a new purpose, but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy in the report of his Lordship's words, because, according to the proposition, as he stated it, if the invention is applied to a new purpose, there cannot but be some novelty in the application. Lord Chief Justice *Cockburn* approaches much nearer to the enunciation of a principle, or at least of a rule, for judging

(1) 8 E. & B. 485.

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these cases, in *Harwood* v. *Great Northern Railway Company* (1), where he says, "although the authorities establish the proposition that the same means, apparatus, or mechanical contrivance, cannot be applied to the same purpose, or to purposes so nearly cognate and similar as that the application of it in the one case naturally leads to application of it when required in some other, still the question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent."

In every case of this description one main consideration seems to be, whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study. Now, strictly applying this test, which cannot be considered an unfair one, to the present case, it appears to me impossible to say that the patented invention is merely an application of an old thing to a new purpose. The only examples of old use alleged by the Defendants were in grindstones and water-wheels. No doubt these have what may be called bearings, but they are of a totally different character, and for a totally different object, from the bearings patented.

In neither water-wheel nor grindstone is there a wooden bearing in which the wheel revolves, but the wheel is merely supported on wood, not encased nor submerged, nor constructed for the purpose of admitting the water to flow freely within the bearing, and the revolutions of each of them are at a very slow pace.

It is difficult to believe that bearings of this description could ever have suggested the application of wood to the bearings of screw-propellers in the way described in the patent. It is, to my mind, not merely a different application, but something in itself essentially different. It had been found that, in the mode of constructing screw-propellers by making metal work upon metal, they soon wore out, and occasioned a violent irregular motion on the vessel. Mr. *Penn*, having turned his attention to the remedying this defect, devised the plan of placing fillets of wood upon the

(1) 2 B. & S. 208.

inner surface of the bearings, so as to prevent the shaft coming in contact with the metal of the bearings, and so as to admit of the water flowing freely between the shaft and the inner surfaces of the metal bearings, thereby keeping the wood constantly lubricated. The success of this invention has been proved in a remarkable manner, for the revolutions of a screw-propeller being upon an average at the rate of 120 a minute, the metal bearing very soon wore out with the friction occasioned by this great velocity, and yet the wooden bearings of the Plaintiff, fitted into vessels, have continued serviceable, without repair, for some years. It would be an extraordinary fact if an invention of this kind, so long wanted, and of such great utility, should have been lying in everybody's way who knew anything of the construction of a water wheel or grindstone, and yet should never before have been discovered. And equally remarkable, if the invention had been anticipated in these familiar machines, that the Admiralty and the mercantile marine, and upwards of fifty firms, should have submitted to pay royalties for the privilege of being permitted to use it.

I have now disposed of every question connected with the patent; but there was one ground of application for a new trial which must be shortly noticed. It is said that the Defendants were proceeding to cross-examine some of the Plaintiff's witnesses as to their knowledge of the use of wood for bearings in paddle-wheels prior to the date of the patent, and that the Vice-Chancellor stopped them upon the ground that this was not within the notice of objections. I apprehend, that it is always competent upon cross-examination, to put a question in this general form. The counsel would not be entitled to inquire of the Plaintiff's witnesses as to any specific instance of the prior use of the patented invention of which he had not given notice; but he has always a right to test the general knowledge of the witnesses upon the subject.

In order to ground this objection, however, the question proposed to be put should have been formerly tendered to the Judge, and rejected by him as inadmissible. Now, it appears that his Honour was never distinctly requested to admit any specific question, but from some cursory remarks it is assumed that he would not have permitted a particular line of cross-examination.

This, however, is not sufficient. The Judge should have an

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opportunity of deciding upon some distinct question, and have refused to allow it, before there can be a motion made for a new trial on account of the rejection of evidence. This objection, therefore, has no foundation.

The motion for a new trial must be refused with costs.

Solicitors for the Appellants: Messrs. *Norris & Allen.*
Solicitors for the Respondents: Messrs. *Hill, Son, & Heald.*

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BELANEY *v.* BELANEY.

Will—"Personal Property, Estate, and Effects"—Term in Gross or attendant—Merger.

A. B. purchased the residue of a term of ninety-nine years at a ground-rent, and the term was assigned to him. In the following year he bought the freehold reversion, and, by a deed reciting that he was desirous that the term should not merge, the reversion in fee was conveyed to a trustee, subject to the term, in trust for *A. B.*, his heirs, or assigns, and to be conveyed and disposed of as he or they should direct. *A. B.* afterwards made a will, giving to his wife "the whole of my personal property estate and effects of every and whatsoever kind they may be:"—

Held, affirming the decision of the Master of the Rolls, that the gift in the will was confined to personal estate, and did not pass the reversion in fee, but that the term was a term in gross, and passed by the will as personal estate.

THIS case came before the Court on an appeal by the Plaintiff from part of an Order of the Master of the Rolls, made on the hearing of a special case (1).

In 1864, the testator, *Archibald Belaney*, purchased a leasehold house for £825, and it was, by indenture of the 27th of July, 1864, assigned to him for the residue of the term for which it was holden, under a building lease of the 24th of June, 1863, being ninety-nine years from the 25th of March, 1862, at the rent of £8 2*s.* 6*d.*

Some time after this the testator contracted for the purchase of the freehold reversion in the premises, and by an indenture dated the 12th of January, 1865, between the ground landlord of the first part, the testator of the second part, and *F. J. Cotton* of the

(1) Law Rep. 2 Eq. 210.

third part, reciting the lease, and a contract for the purchase of the fee by the testator, subject to the lease, for £220, and reciting that the testator "was desirous that the said term of ninety-nine years created by the said indenture of lease should not merge, and that it had therefore been agreed that the said hereditaments should be assured in manner thereinafter mentioned," the vendor, in consideration of the purchase-money, conveyed the dwelling-house and premises, with the rent reserved by the lease, and all his estate therein, subject to the lease, unto and to the use of *Cotton* in fee, "in trust for the said *Archibald Belaney*, his heirs and assigns, for ever, and to be conveyed and disposed of as he or they shall direct."

On the 23rd of May, 1865, the testator made his will, which, so far as is material, was in the following words:—"I hereby give and bequeath to my said wife the whole of my personal property estate and effects of every and whatsoever kind they may be for her sole use and benefit."

The Master of the Rolls decided:—1. That this gift did not pass real estate. 2. That under it the leasehold interest assigned by the deed of the 27th of July, 1864, passed as personalty; the reversion only, subject to the lease, descending to the heir-at-law.

The widow, who was Plaintiff in the special case, appealed from the declaration made on the first point, but the heir-at-law objecting to the decision on the second point, the whole case was re-argued. It was stated at the bar that, on examination of the original will, a comma was found after the word "property."

Mr. *E. Charles*, for the widow:—

In a will of this kind, in which the testator shews a general intention of giving his property to the widow, and uses the word "estate," the onus lies on the heir-at-law to shew that the word is to receive a restricted meaning. The word will pass everything unless it is qualified: *Barnes* v. *Patch* (1). The first authority giving any principle as to what will restrict it when associated with words relating to personalty is *Tilley* v. *Simpson* (2). The principle is, that if the other words, taken by themselves, will pass the whole personal estate, it is not to be restricted, but will pass real

(1) 8 Ves. 604. (2) 2 T. R. 659, n.

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estate. Real estate accordingly passed in *Jongsma* v. *Jongsma* (1), under "goods, estates, bonds, debts;" in *Doe* v. *Evans* (2), under "all my money, securities for money, goods, chattels, estate, and effects;" in *Midland Counties Railway Company* v. *Oswin* (3), under "money, goods, chattels, estate, and effects;" in *O'Toole* v. *Browne* (4), under "residue of my goods, chattels, stock-in-trade, estate, and effects of what nature or kind soever."

The Master of the Rolls said that to give effect to our contention would strike the word "personal" out of the will; but the word may legitimately be understood as only extending to "property," and the comma, which may be attended to, *Compton* v. *Bloxham* (5), *Oppenheim* v. *Henry* (6), shews that this is all that was intended.

As to the second point, this is a term in gross. It was not a term created for any limited purpose, as raising portions. In such cases, the term, when the particular purpose is satisfied, becomes attendant, because the only purposes for which it was severed from the inheritance have come to an end, and there is no person but the owner of the inheritance to whom you can attribute any beneficial interest in it; but here the term was created for the purpose of giving a beneficial interest to the lessee throughout its duration. The conveyance of the fee shews expressly an intention to keep the term separate. The term is a term in gross, *Gunter* v. *Gunter* (7), and forms part of the personal estate: *Williams* on Executors (8).

Mr. *Bevir*, for the heir-at-law:—

As to the first point, the cases only shew that, where the will manifests an intention to pass the whole property, the Court will not confine the meaning of the word "estate" merely because it is associated with words relating only to personalty. Here the word "personal," in plain grammatical construction, applies to all the substantives.

As to the second point, I contend that the term follows the fee.

(1) 1 Cox, 362; 1 Jarm. Wills, 3rd ed. 688.
(2) 9 Ad. & E. 719.
(3) 1 Coll. 74.
(4) 3 E. & B. 572.
(5) 2 Coll. 201.
(6) 9 Hare, 802, n.
(7) 23 Beav. 571.
(8) 6th ed. 1548.

In *Sugden's* Vendors and Purchasers (1) it is laid down, that when a term is vested in a trustee, in trust for the owner of the inheritance, it attends the inheritance in the absence of express declaration to the contrary, and this is warranted by the cases: *Dowse* v. *Percival* (2); *Tiffin* v. *Tiffin* (3); *Best* v. *Stampford* (4); *Attorney-General* v. *Sands* (5); *Thruxton* v. *Attorney-General* (6); *Cooke* v. *Cooke* (7); *Capel* v. *Girdler* (8); *Goodright* v. *Sales* (9). The present decision, and that in *Gunter* v. *Gunter*, are hardly consistent with *Pitt* v. *Pitt* (10); and the case of *Hood* v. *Phillips* (11) shews that the taking a transfer to a trustee is not enough to rebut the presumption that where the same person is entitled in equity to the reversion and the term, the term merges. The object of taking the conveyance to a trustee is to keep the term on foot, only as a protection against mesne incumbrances. The Master of the Rolls thought that a devisee could have claimed the term, but a devisee is in no better position than an heir.

Mr. *Charles*, in reply:—

In none of the cases cited on the other side, as to the second point, was there any declaration that the term should not merge. *Best* v. *Stampford* is opposed to *Hayter* v. *Rod* (12). *Gunter* v. *Gunter* is not touched by *Pitt* v. *Pitt* and *Hood* v. *Phillips*, which relate to satisfied terms.

Mr. *Bevir*, on *Hayter* v. *Rod*:—

Hayter v. *Rod* was a case in which the owner of the fee, being also equitable owner of the term, declared separate trusts of the term, thereby severing it from the inheritance, which, of course, any absolute owner of both interests can do.

LORD CHELMSFORD, L.C.:—

The first question to be considered on this appeal is, whether, under the testator's will, his real estate passed to his widow. The

(1) Vol. iii. p. 87, 10th ed. 571, 13th ed.
(2) 1 Vern. 104.
(3) Ibid. 1.
(4) 2 Vern. 520.
(5) 3 Ch. Rep. 19.
(6) 1 Vern. 340.
(7) 2 Atk. 67.
(8) 9 Ves. 509.
(9) 2 Wils. 329.
(10) 22 Beav. 294. 2 Jur. N.S. 1010
(11) 3 Beav. 513.
(12) 1 P. Wms. 358.

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rule laid down by the House of Lords as to the construction of wills is, that you are to take the words as being used in their proper meaning, unless something is found in the will to shew that the testator intended to use them in a different sense. If the words of the will are ambiguous, you may resort to the surrounding circumstances as a help in ascertaining the testator's meaning, but it has never been decided that you can do so when the words are clear. Now, if the words of this will are read according to their ordinary sense and construction, the word "personal" overrides all the subsequent words, "property, estate, and effects." It has been urged that the will is to be read as if there were a comma after the word "property," and that the effect of the word "personal" is exhausted upon the word "property," and extends no further. I am, however, bound to ascertain the meaning of the testator from his words, and I cannot doubt that "personal" extends to the subsequent words as well as to "property." The cases cited for the Appellant were only cases where the word "estate" was held not to be qualified by being associated with words relating only to personalty, and have no bearing upon a case where the word "estate" is overridden by the word "personal." I might here guess that it was the testator's intention that all his interest in this property should go in the same direction, but that would be mere conjecture, and I should have to strike out the word "personal" in order to give the will such a construction.

The next question is, whether the term of ninety-nine years passed under the will to the Plaintiff as personal estate, or followed the inheritance, and is undisposed of realty. It is most important to observe, that in the conveyance of the reversion, taken by the testator within a year after the assignment of the term to him, it is stated that the conveyance is taken to a trustee for the express purpose of preventing merger. The term, therefore, remained in the testator as personal estate. In all the cases referred to on the part of the Defendant, although there was nothing in the deeds to indicate that the terms were to be attendant on the inheritance, there was nothing to indicate that they were not. The case might, perhaps, be different if the testator had died intestate, and the question were between the heir-at-law and next of kin. As regards creditors, it is clear that this term would have been assets.

I entertain some doubt as to the correctness of the opinion of the Master of the Rolls, that a devisee of the testator's real estate would have taken the term, but I quite agree with his Lordship's view, that as this term was made a term in gross, no matter for what reason, and so retained its character of personal estate, and as the personal estate, by the will, was given to the widow, this term went to her as part of the personalty.

Solicitors for both parties: Messrs. *Coode, Kingdon, & Cotton.*

AUSTIN *v.* TAWNEY.

Option of Purchase—Notice—Solicitor.

A testator gave to his children in succession an option to purchase certain property at a price to be fixed by arbitration within a prescribed time, and declared that the time to be allowed to each of his children for exercising the option was to be two calendar months, within which time he or she, in the event of purchasing, should enter into such an agreement for completion as the arbitrators should approve. The award was left, on the 5th of May, at the office of the solicitor of the trustees and the testator's family, who also acted for the eldest son. The solicitor, on the 7th, wrote to the eldest son, informing him of the price. The son, on the 16th of June, replied by letter that he elected to take the estate at the price, and went on to ask that if he had to sign any agreement it might be forwarded to him. He signed, on the 6th of July, an agreement approved by the arbitrators, and shortly after completed the purchase. The son having sold the property and filed a bill for specific performance:

Held, by the Master of the Rolls, that the title was marketable, for that the letter of the 16th of June, which was clearly sent within the two months, was a valid exercise of the option:

Held, by the Lord Chancellor, that the title was marketable, for that the two months ought to be reckoned, not from the date of the award, but from the time when it was first communicated to the son; and that thus the formal agreement was signed within the two months, and

Semble, that the option was effectually exercised by the letter of the 16th of June:

Held, also, that the son was not to be deemed to have had knowledge of the award from the time when it was communicated to the solicitor.

THIS was an appeal from an order of the Master of the Rolls in a suit for specific performance, deciding that the Plaintiff had shewn a good title to the property which formed the subject of the suit.

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The objections taken to the Plaintiff's title, arose as follows:—

The Plaintiff was the eldest son of *John Austin*, who, by will, dated the 3rd of December, 1852, devised his freehold, leasehold, and copyhold estates, to trustees, upon trust to pay the net rents to his wife for life, and after her death to sell the property. Then came the following proviso: "Provided always that before any such general sale shall take place as aforesaid, my eldest son *Richard*" (the Plaintiff), "shall have the option of purchasing [certain property, including the property now in question], at such price or valuation as shall be fixed by arbitration as hereinafter provided for; and if my eldest son *Richard* shall neglect or refuse to take to the said hereditaments and complete the purchase thereof upon the terms hereinafter specified," then the testator gave a similar option to two other sons, according to seniority, and then to his four daughters, according to seniority, and if none of them took to the property, it was to be sold under the general trust for sale. Similar options were given to the children in different orders of priority with respect to other portions of the property. The will contained this further clause:—

"The several valuations of my real and personal estates hereinbefore directed to be made, shall be made by two indifferent persons, one of whom shall be chosen by my said children, or such of them as shall be living at my decease, or the majority of them; and the other by my said trustees, with power for such arbitrators to choose an umpire in the event of their disagreeing. The arbitrators to be chosen and named in writing within three calendar months after the decease of the survivor of me and my said wife; and if either party neglect or refuse to name an arbitrator within that time, the arbitrator chosen by the other party may proceed alone, and his decision shall be final. The arbitrators shall make their award in writing, or appoint an umpire, within one month after their appointment, and the umpire shall make his award in writing within one month after his appointment. *The time to be allowed to each of my said children, in which he or she is to have the option of purchasing under the provisions of this my will, shall be two months, within which time he or she shall, in the event of purchasing, enter into such an agreement for completion of his or her purchase as the said arbitrators or umpire shall direct or approve*

of, each child to have a month after the neglect or refusal of another to purchase."

The testator died in 1854; his widow on the 8th of January, 1859. On the 6th of April, 1859, the Plaintiff and five of the other children of the testator appointed an arbitrator, and on the same day the trustees appointed another. The arbitrators on the 5th of May, 1859, made their award as to the property in question, valuing it at £8300. This award was, on the same day, left at the office of Mr. *Aplin*, the solicitor of the trustees, who was also the solicitor of the family, and to some extent acted in this matter as solicitor for the Plaintiff, who, until the formal agreement was afterwards sent him, did not employ any other solicitor in reference to it. Mr. *Aplin* was away, and did not personally become aware of the contents of the award till the next day. On the 7th of May, Mr. *Aplin* sent to the Plaintiff, who up to that time did not know of the award, an extract shewing the price. The Plaintiff, on the 16th of June, 1859, replied as follows:—

"I beg to apprise you, and the executors of my late father, that I elect to take the estate at *Boddicott*, at the price fixed by the arbitrators, under the provisions of his will. If there is any agreement it will be necessary for me to sign previously to the 8th of July, please furnish me with it in due time."

On the 24th of June, a copy of a formal agreement, approved by the arbitrators, was sent by Mr. *Aplin* to the Plaintiff, who had it perused by another solicitor, and approved it on the 2nd of July. Under it the Plaintiff in substance agreed to accept such title as the testator had. On the 5th, Mr. *Aplin* sent the engrossment to the Plaintiff, who signed it on the following day. It was also signed by the arbitrators in token of their approval. The purchase was completed in due course. The Plaintiff having afterwards contracted to sell this property to the Defendant, the Defendant declined to complete, alleging that the option had not been effectually exercised, as the agreement was not signed till more than two months after the date of the award, and that the title, therefore, was bad. Upon which the present bill was filed.

The Master of the Rolls gave no opinion on the question whether the formal agreement was signed in time; but decided

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that the letter of the 16th of June, 1859, was a sufficient exercise of the option, and that the title was good. The Defendant appealed.

Mr. *Baggallay*, Q.C., and Mr. *Martineau*, for the Appellant:—

The time must run from the date of the award, there being no direction that the trustees shall offer the property to the Plaintiff, he being a party to the reference, and being as much in a position to know the contents of the award as they were. The will requires the signature of a contract, approved by the arbitrators. The letter of the 16th of June does not satisfy this condition. If it made a contract, the trustees would be bound to deduce a marketable title; but under the agreement approved by the arbitrators, they are only to give such title as the testator had. Options of purchase are to be construed strictly: *Brooke* v. *Garrod* (1). The case of *Lord Lilford* v. *Powys-Keck* (2), which was cited on the other side, is not against us, for there the trustees were to offer the property to the person having the option, so time could only run from the offer. The Plaintiff had, through his solicitor, notice of the award on the day it was made, and such notice is direct, not constructive notice: *Espin* v. *Pemberton* (3). The title is, at all events, too doubtful to be forced on a purchaser: *Collier* v. *M'Bean* (4); *Pyrke* v. *Waddingham* (5).

Mr. *Selwyn*, Q.C., and Mr. *W. W. Cooper*, were not called upon, except on a point as to costs.

LORD CHELMSFORD, L.C.:—

I entertain a strong and clear opinion in favour of the Plaintiff's case. There is no doubt that a condition precedent must be strictly performed, and the point to be determined is, whether the conditions in the present case have not been complied with. The first question is, from what time the two months allowed for the exercise of the right of pre-emption are to be reckoned. The purchaser contends that time began to run from the date of the award. It is, however, admitted that the words of the will are susceptible of another interpretation, making the period of two

(1) 3 K. & J. 608; 2 De G. & J. 62.
(2) 30 Beav. 295.
(3) 3 De G. & J. 547.
(4) Law Rep. 1 Ch. 81.
(5) 10 Hare, 1.

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months begin only from the time when the Plaintiff received notice of the award, and of the price fixed by it. I am clearly of opinion that the time to be allowed must begin only from the time when the Plaintiff, by having the award communicated to him, was placed in a position to exercise his option. It is urged that the award was given out to the Plaintiff's solicitor on the day when it was made, and that, according to the principle that notice to the solicitor is notice to the client, the Plaintiff must be taken to have known the contents of the award on that day. The cases in which that rule applies, are cases between hostile parties, where notice is received of an adverse right; but it has no application to a case like the present, where the object of the testator merely was that his children should have successive options to purchase, to be exercised within reasonable limited times. The period being reckoned therefore from the 7th of May, the formal agreement was signed within the prescribed time. I am disposed also to think that the Master of the Rolls was right in the view that the letter of the 16th of June, was a sufficient exercise of the option.

Solicitors for the Plaintiff: Messrs. *Cunliffe & Beaumont.*
Solicitors for the Defendant: Messrs. *Walker & Martineau.*

RAPHAEL *v.* THAMES VALLEY RAILWAY COMPANY.

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1866
Dec. 19, 20.
1867
Jan. 11.

Railway—Public Convenience—Injunction—Specific Performance.

The Plaintiff, a landowner, had withdrawn his opposition to a railway bill in consideration of the company agreeing to make a road and an approach in a particular manner. The company altered the level of their line, and varied the course and inclination of the road. The bill was filed pending the works, and a motion for injunction had been ordered to stand to the hearing, on the company undertaking to abide by the direction of the Court as to altering their works. The railway had since been opened for traffic:—

Held (reversing the decree of the Master of the Rolls), that the Plaintiff was entitled to specific performance, and that the company could not set up the inconvenience to the public by the interference with the traffic as a reason for not performing their agreement.

3 Ch 101, 289
— 742
4 Ch 195
5 Ch 417
11 Eq 101
4 PC 111
9 Ch 283.

EDWARD RAPHAEL, one of the Plaintiffs in this case, was the owner of certain lands called *Kempton Park*, through part of

17 Eq 162 18 Eq 732, 746

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which the *Thames Valley Railway* was intended to pass. By an agreement between the promoters of the railway company and Mr. *Raphael*, it was agreed, amongst other things, that a road to the park lodge and a bridge over the railway should be made; that the company should purchase part of the *Kempton Park* estate for the purpose of the railway, and that thereupon Mr. *Raphael* should withdraw his opposition to the bill then before Parliament. The company obtained their Act, and by a subsequent agreement, dated the 15th of July, 1863, and made between Mr. *Raphael* and the company, the former agreement was varied, and the company agreed to make the road and bridge according to a plan annexed. The company, however, had altered the level of the railway, and began to make the road and bridge in a different way, and at a different level, alleging that it was impossible to make the works according to the agreement. Mr. *Raphael's* solicitors wrote, on the 17th of May, 1864, to complain, but the company proceeded, and Mr. *Raphael* filed his bill to restrain them, and moved for an interim injunction. The motion was ordered to stand over until the hearing, the company undertaking to deal with the bridge and road as the Court should think fit.

The company accordingly went on with the bridge and road, which, as constructed, were admitted to be less convenient to the Plaintiff than those on the plan, and the railway was completed and opened.

In the meantime, Mr. *Raphael* had sold the estate to Messrs. *Barnett & Birch*, who were made parties to the suit, and the Plaintiffs entered into evidence to shew the inconvenience of the road and bridge as made, and the possibility of making them according to the plan. The Defendants entered into evidence to the contrary, and also that the alteration could not now be made without risk to the public. There was also a question raised in the bill as to the form of the conveyance of the land which the company had bought from the Plaintiffs.

The cause came to a hearing before the Master of the Rolls, and as the Defendants contended that the road and bridge could not be made as proposed by the Plaintiffs without going on the Plaintiffs' land, the Plaintiffs, by their counsel, declared themselves willing to allow this to be done. The Master of the Rolls, however,

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dismissed the bill, without costs, and without prejudice to any action for damages which the Plaintiffs might bring. His Lordship's judgment was founded mainly on the danger and inconvenience to the public of altering the works, and on the impossibility of valuing the land which would be taken by the railway from the Plaintiffs if the alteration was made as proposed by the Plaintiffs. As to the form of the conveyance, his Lordship thought the company was right. The case is fully reported (1).

The Plaintiffs appealed, and the arguments and authorities used on the former hearing were again relied on.

Mr. *Jessel*, Q.C., and Mr. *Rawlinson*, for the Plaintiffs.

Mr. *Selwyn*, Q.C., and Mr. *E. K. Karslake*, Q.C., for the company, besides using the arguments employed in the Court below, contended that the Plaintiffs had no right to lie quiet, knowing that the bridge and road could not be made according to these plans, and file their bill when the company had begun their works. The Plaintiffs never offered the land which would be required, and knew that the road could not be made without it. Besides, this was a question which, under the *Railways Clauses Consolidation Act*, ought to have been settled before two justices.

Mr. *Jessel*, in reply.

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Jan. 11. LORD CHELMSFORD, L.C., after stating the facts of the case, and expressing his opinion that there had been no waiver, as the company had contended, continued:—

At the time when the letter of the 17th of May was written, the works connected with the bridge had not been commenced, but almost immediately afterwards, the company proceeded to lay out the lodge road in a line different from, and much more curved than that described in the plan annexed to the agreement of the 15th of July, 1863. The Plaintiffs thereupon filed their bill for specific performance, and for an injunction to restrain the company

(1) Law Rep. 2 Eq. 37.

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from making the road and bridge otherwise than in the manner specified in this agreement.

A motion for an injunction was afterwards made, and the company being desirous of continuing their works, entered into an undertaking to remove and deal with the bridge, road, and works as the Court should direct; and upon this undertaking the company have since proceeded with and completed the works. At the close of the argument upon the hearing before the Master of the Rolls, it having been intimated that the lodge road might be formed with the inclination provided for by the agreement, if the company could make use of the Plaintiffs' land beyond the limits of deviation, his Lordship asked whether the Plaintiffs would now allow the company to go upon their land, beyond the limits of deviation, so as to make the bridge and road in the position and with the inclination specified in the agreement, without altering the level of the railway? And he received an answer (which was afterwards repeated in writing) in the affirmative. His Lordship, after taking time to consider his judgment, dismissed the Plaintiffs' bill, without costs. Adverting to the consent which, as above mentioned, he had obtained from the Plaintiffs, he pointed out the difficulty he had in acting upon it, as he could not compel the Plaintiffs to part with their land without compensation, which he had no means of assessing. The written consent of the Plaintiffs, however, precluded the necessity of an assessment of the value of the land, as it was merely to be a permission for the company to use the land for making the road, the road, when formed, of course continuing to be vested in the Plaintiffs, like the road intended to be made under the agreement of May, 1862; but no doubt, without the consent of all parties, there could have been no decree for specific performance of the agreement, with a variation.

The Master of the Rolls was of opinion that the bridge and road were not in accordance with the contract, but, after stating that the Plaintiffs had gone into much evidence to shew that the railway might at no great expense be lowered, so as to permit the road to be made at the spot and with the inclination specified in the agreement, his Lordship added:—"But it is the duty of the Court to remember that there is another class of persons who

are not represented in this suit, and whose interests must be carefully watched: that class is the public, and it would be too great and much too dangerous a power for the Court of Chancery to exercise, were it to direct that the level of a railway actually in work, and engaged in carrying passengers and goods, should be altered for the specific performance of a contract entered into between the company and a landowner." And in another part of his judgment his Lordship, observing that the specific performance solely involved a question of a more or less convenient access to a gentleman's mansion, and that the convenience was confined to the difference between a small circuit or deviation and a comparatively straight road, said :—"I am called upon, for the purpose of rectifying this deviation, to do what may sacrifice the convenience of the public, and very possibly make them incur some risk, and this in their absence."

Whether in a case where there has been a determined and wilful breach of an agreement by a railway company, the element of public convenience ought to be introduced to prevent a decree for specific performance, is at least questionable; but I can hardly think it ought to have been permitted to influence the judgment of the Master of the Rolls in the present case.

The Plaintiffs having filed their bill to restrain the company from building the bridge and constructing the road in defiance of their agreement, it might have been expected that the company would have suspended their operations until the question could be determined. The only inconvenience which the public would have sustained, if this course had been adopted, would have been, that the opening of the railway would have been delayed; but as this would have been prejudicial to the interests of the company, they preferred to proceed and complete the line, with the leave of the Court, upon an undertaking to deal with their works as the Court should direct. Having thus gained their end, in not being forced to discontinue their operations, and having in this manner obtained permission to complete their railway, the convenience, and even the safety, of the public is now interposed to make the undertaking perfectly illusory. With great respect to the Master of the Rolls, I cannot see why the working of the railway must necessarily continue during the alteration of the level, and thereby the

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public incur a risk from which they are to be guarded by the refusal of a decree for specific performance.

If the company had not entered into an undertaking, they must (as already observed) have delayed proceeding with their railway for an indefinite period, and they may now have to bear a temporary suspension of their traffic, if it should be found to be necessary in order to enable them to construct the bridge and road in strict accordance with their agreement, which, however, the Plaintiffs' witnesses positively state will not be requisite.

With respect to the degree of injury sustained by the Plaintiffs by the company's departure from their agreement, there is evidence on both sides. On the part of the Plaintiffs it is sworn that the road has been deviated considerably to the eastward, forming sharp curves, so as to render the approaches on either side of the bridge inconvenient and dangerous, even during the day, and extremely so during the night; and, again, the company having laid the rails so much above the level stipulated for in the agreement, have very materially damaged the estate, by increasing the height of the embankment generally, and particularly by raising the elevation from the approach from the *Hanworth Lodge* entrance to the mansion and park, a height of 2 feet 6 inches, being from about 14 feet 6 inches to 17 feet, a difference of great importance, and one adding considerably to the steepness of the incline. I do not find that the company's witnesses deny that the curves in the road are inconvenient and dangerous, as the Plaintiffs' witnesses state them to be; nor is there any denial by them that the Plaintiffs' estate has been damaged, except in qualified terms, one witness stating that no damage has been sustained by the Plaintiffs by reason of the line being laid at higher levels between certain points on the plan, but afterwards admitting that the estate must have received some damage, by adding:—"In fact, to have followed with perfect strictness, as to levels, the plan and section attached to the said agreement would have been a far greater injury to the *Kempton Park* estate than the works of the railway as now executed." This witness also says, that the alterations of the present line through *Kempton Park*, so as to make it in accordance with the sections attached to the agreement, would involve a magnitude of expenditure which could not be justified by any commensurate benefit to

the *Kempton Park* estate;" as if, when a railway company has broken an agreement with a landowner, such a calculation of expense on the one side and benefit on the other, can ever be reasonably and fairly objected to the claim to a decree for specific performance.

It does not appear to me that the injury which the Plaintiffs have sustained, by the breach of the company's agreement, is one which can be adequately compensated by damages, and I think, upon a review of all the circumstances, they have a right to have the stipulations of the agreement strictly performed.

The promoters originally procured the withdrawal of Mr. *Raphael's* opposition to their bill as the consideration of the first agreement. They afterwards obtained his consent to vary it, and to dispense with works of an expensive character, upon which the second agreement was entered into. Before the road and bridge, the subject of dispute, were marked upon the plan annexed to the last agreement, discussions took place, and the exact line in which they were to be constructed was agreed upon. The plan was drawn accordingly, and a copy of it was afterwards put upon the conveyance prepared by the company's solicitors for execution. The company discovered, as they say, that it was physically impossible to perform the agreement, if they were to confine themselves to the line indicated on the plan. The Plaintiffs' solicitors objected to any deviation, and their surveyors were and are of opinion that the line may be preserved, and the inclinations of the bridge and road not varied, by a strict adherence to the agreement. The company, however, persevered in deviating from the agreed line, so as, in the opinion of the Plaintiffs' witnesses, materially to damage the estate, and to interfere with the safety of the access to it, and then, having obtained permission to continue and complete their works, which have not been disputed to be a departure from the agreement, they bring forward the public convenience as a ground why their undertaking should not be enforced, nor a specific performance of their agreement decreed.

Although I have no power to enforce any arrangement between the parties, I cannot forbear recommending to the company the consideration of the offer made by the Plaintiffs, to allow a part of their land, beyond the limits of deviation, to be used for the construction of the road, without paying anything for the ac-

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commodation, which offer, I take for granted, will not be departed from.

As I feel myself compelled to make a decree for specific performance of the agreement, it is hardly necessary for me to notice the other subjects of dispute which have arisen out of it. I think that the Plaintiffs were not warranted in their demand that the stipulations in the agreements should be inserted as covenants in the proposed conveyance. The exceptions introduced in the conveyance were necessary to qualify the effect of the general words, and so far from the conveyance superseding the agreements in the exception with respect of the running of water from the Plaintiffs' land, under the railway, the channels through which the water is to pass are described as the culverts, ditches, and communications which the company have made, or shall make, in accordance with certain articles of agreement between the parties hereto, made the 15th of July, 1863. How is it, then, possible to say, that if the conveyance had been executed in the form proposed, it would have superseded all the stipulations in the former agreements, and have taken their place as the final agreement between the parties?

With respect to the complaint as to the culverts and ditches and other accommodation works, it seems to me to be quite immaterial whether the agreement to settle disputes upon these subjects in the manner directed by the *Railways Clauses Consolidation Act* is binding, or not. If these had been the only matters in difference between the parties, and the Plaintiffs having agreed to settle them in a summary and inexpensive manner, instead of pursuing this course, chose to file a bill, to compel the performance of the agreement respecting them, I think the Court would have exercised a proper judicial discretion in dismissing such bill.

The decree of the Master of the Rolls must be reversed, and a decree made for specific performance, according to the prayer of the bill.

Solicitors for the Plaintiffs: Messrs. *Birch & Ingram.*

Solicitors for the Defendants: Messrs. *Hargrove, Fowler, & Blunt.*

EARL HOWE *v.* EARL OF LICHFIELD.

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Legacy or Succession Duty—Trust for Sale—Certificate of Inland Revenue Office—Succession Duty Act, 1853, *s.* 51—*Vendor and Purchaser.*

Where trustees for sale under a will, who had entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vested the estate in the person to whom (subject to the trust) the land was devised, whereby he became the proper party to convey, *semble*, that succession duty, and not legacy duty, ought to have been paid.

Held (affirming the decree of the Master of the Rolls), that a certificate from the Inland Revenue Office that the duty was paid, discharged the land, and that the purchaser could require no further evidence on the subject.

THE HON. *R. CURZON*, by his will, devised his lands to trustees in fee upon trust, by mortgage or sale, to raise £20,000, and pay off a mortgage, and, subject thereto, in trust for his son *Robert Curzon*. The testator died in 1863, and the trustees put up part of the lands for sale in lots, and the Defendant, the Earl of *Lichfield*, became the purchaser of two of the lots. In 1864, before the conveyance to the Defendant, the £20,000 and the mortgage money were paid out of the proceeds of the sale of other parts of the lands, and the mortgagees and trustees of the will conveyed the legal estate to Mr. *Curzon*. The trustees of the will had paid legacy duty on these lands, but the purchaser contended that succession duty ought to have been paid.

The Inland Revenue Office refused to receive succession duty, being of opinion that legacy duty was properly payable, and, finally, the Comptroller of Legacy and Succession Duties sent to the solicitors of the trustees a letter or certificate that the duty had been paid upon the property in question.

The Defendant, however, contended that this was insufficient, and the trustees of the will filed this bill for specific performance, contending, first, that succession duty was payable; and, secondly, that the land was not discharged by virtue of the certificate.

The suit came to a hearing before the Master of the Rolls, who was of opinion that legacy duty was payable, and, moreover, that under the circumstances, it was immaterial which was payable,

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and His Lordship decreed specific performance as reported (1), where the facts are fully set forth.

The Defendant appealed.

Mr. *G. M. Giffard*, Q.C., and Mr. *C. Russell*, for the Appellant, besides the arguments used in the Court below, contended that the vendors were bound to shew that succession duty had been paid on the whole of the lots sold, and not merely that it had been paid on this one lot. The vendors had not procured a satisfactory certificate. Succession duty was therefore payable, and, if so, what defence would there be to an information filed to recover the proper duty? *Sugden's* Vendors and Purchasers (2).

Mr. *Selwyn*, Q.C., and Mr. *Morgan*, for the Plaintiffs, were not called upon.

LORD CHELMSFORD, L.C., after stating the facts of the case and the correspondence, said:—

The Defendants still refuse, notwithstanding these letters, to complete the purchase, and this bill was filed for specific performance. Now, it appears to me, in the view which I take of this case, to be immaterial whether the property was liable to legacy duty or to succession duty. I confess that if I was called upon for an opinion, I should decide that succession duty, and not legacy duty, was payable, but in the view which I have taken the question is immaterial.

It was argued before me that the Defendant was entitled to a certificate that succession duty had been paid, not merely on the lots purchased by him, but on the whole of the lots, upon the ground that succession duty ranged over the whole estate, and that the whole was liable to it, and that a good title could not be made without shewing this. Now this is a new question which has been raised, for it is clear that from the beginning to the end of this unfortunate contest the question has been, whether the proper duty has been paid upon these lots which were purchased by Lord *Lichfield*. The form of the certificate which the purchaser desired to have, and the answer, apply entirely to the succession duty in

(1) Law Rep. 1 Eq. 641. (2) 14th Ed. p. 556. 13 Ld 446
35 Beav 370

respect of these particular lots, and, therefore, it appears to me not quite right to raise an entirely new question upon this appeal, a question which was never thought of until now.

Then, assuming that succession duty was payable upon these lots, the facts are, that a sum of more than £51 was paid and received as legacy duty upon the property in question, and, according to sect. 18 of the *Succession Duty Act*, "no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."

The Defendant contends that, by reason of legacy duty, and not succession duty, having been paid in respect of this property, there is a blot upon the title, and that he would not be able to make a good title to a purchaser. But suppose that an abstract was made out in the usual form, and that the proposed purchaser had made the objection that no proof had been given of payment of succession duty, the answer would be, that legacy duty had been paid to more than the amount of the succession duty, and that this part had been charged with this duty; the title would then be clear from this objection. It was suggested that an information would lie against Mr. *Curzon* for non-payment of succession duty, but it appears to me that if any such proceedings were taken it would be a complete answer to say that it had been paid as legacy duty, and that the property could not be charged with succession duty. It appears to me that Lord *Lichfield's* objection is unfounded, and that there is no objection to the title. The Petition of appeal must be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Elsdale & Byrne.*
Solicitors for the Defendant: Messrs. *White, Broughton, & White.*

L. C.
1866
Nov. 20, 21.

BUTT *v.* IMPERIAL GAS COMPANY.

Injunction—Obstruction of View—Power to make Road.

The erection of a building will not be restrained because it injures the Plaintiff by obstructing the view of his place of business.

Where a lessor had power by the lease to divert a road if he made a certain other alteration:—

Held (affirming the decree of *Kindersley*, V.C.), that he had power at any time to make the alteration, and divert the road, although he might have made the alteration for the purpose of entitling himself to divert the road, and that in this respect a power under a deed differs from a power conferred by Act of Parliament.

If the diversion of the road had not been authorized by the lease, but had occasioned no irreparable injury, *semble*, the Plaintiff would have been left to his remedy at law.

By an indenture of lease, dated 12th December, 1844, and made between the *Company of Proprietors of the Regent's Canal* of the one part and the Plaintiff *J. G. Butt* of the other part, the company demised and leased to *J. G. Butt*, for the term of sixty years, a certain piece of land near their laybye or basin at *Hackney*, called *Bunker's Pond Laybye*, for the purpose of storing coals and burning lime. And the lessors agreed that they would make and form a roadway, of good and hard materials, for carts, waggons, and other carriages, over the bank at the south end of the laybye, as shewn in the plan on the margin of the indenture of lease, the road, when made, to be kept in repair by the lessee, and that in case the roadway should be removed for the purpose of extending the laybye (which the lessors, their successors and assigns, were to be at liberty to do), then they, the lessors, their successors or assigns, should and would provide and form a new roadway with the like materials as aforesaid.

The Plaintiff took possession of the land accordingly, and used it to store coals and burn lime, and the company made the road. In 1853 the *Imperial Gas Light and Coke Company*, the Defendants in this suit, purchased several acres of land belonging to the *Regent's Canal Company* including the land subject to the Plaintiff's lease, and built three gasometers on part of the land. In 1864 they proposed to build a fourth gasometer, to do which

the Plaintiff's road would have to be diverted, and the secretary of the gas company, in December, 1864, wrote to the Plaintiff to tell him that they proposed to remove the road, and to make another, and, as they were anxious to put him to as little inconvenience as possible, they wished him to communicate with their engineer on the subject. The Plaintiff appeared to have objected to the alteration of the road, and, in a letter of the 7th of January, 1865, the Defendants claimed the right to have the road altered under the provision contained in the lease, and they proceeded with the new road, which was completed in February, 1865. On the 6th of March the secretary again wrote to the Plaintiff, saying, "Sir,—Referring to my letters of the 24th of December and the 7th of January, I am desired to inform you that the needful arrangements for extending the laybye adjoining your premises at *Bunker's Pond*, have now been completed, and the work will be commenced without further delay. This extension of the laybye necessitates the removal of the roadway at the south end, as I have before informed you; and the directors having had another roadway made, at considerable expense, in lieu of the old one, the roadway which you have been accustomed to use will be broken up immediately."

The Plaintiff thereupon filed a bill against the gas company, stating as above stated, that the gasworks were a great annoyance to him, and very unhealthy, and injurious to him and his family, and that the gasometer proposed to be erected would obstruct the view of his works from the road and deprive him of customers, and that the company did not really and *bonâ fide* want to extend the laybye; and the bill prayed that the company might be restrained from breaking up the road, and from building the gasometer so close to the Plaintiff's premises as to deprive him of the use and enjoyment of them. The Plaintiff filed affidavits in support of the allegations in his bill, and also to the effect that the proposed gasometer would prevent his board, with his name and trade on it, from being seen from the high road; that the new road was longer than the old road, and that, if made, it ought to be in another direction pointed out by him.

The Defendants filed affidavits in opposition; to the effect that the gas-works would be no real annoyance to the Plaintiff, who himself

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had lime-kilns; that they had made arrangements with the *Canal Company*, and really and *bonâ fide* meant to extend the laybye for their own convenience, and that the new road was, in fact, better and more convenient to the Plaintiff than the old road, and was shorter and better than the road he suggested.

The matter came before the Vice-Chancellor *Kindersley*, upon a motion for an injunction, on the 4th of May, 1865, when His Honour granted an injunction to restrain the breaking up of the road, the Plaintiff undertaking to pay damages in the event of the injunction not being maintained.

On the 3rd of March, 1866, the suit came on upon motion for a decree, and the Vice-Chancellor then dismissed the bill with costs (1).

The Plaintiff appealed.

Mr. *Glasse*, Q.C., and Mr. *Rudall*, for the Plaintiff, besides using the arguments referred to in His Lordship's judgment, contended that the Plaintiff ought not to be obliged to repair a road which was longer than the original road.

Mr. *Baily*, Q.C., and Mr. *Bagshawe*, for the Defendants.

Mr. *Glasse*, in reply, as to the Plaintiff being left to his remedy at law, cited *Lloyd* v. *London Chatham and Dover Railway Company* (2).

(1) March 3, 1866. The Vice-Chancellor *Kindersley*, in delivering judgment, said that he could not decide between the trades carried on by the Plaintiff and the Defendants; probably each was very objectionable and very disagreeable; but under these circumstances he could not grant an injunction on the ground of nuisance, especially as the Plaintiff had submitted to the erection of gasometers in 1853 and 1857. Nor could an injunction be granted to restrain the erection of the gasometer merely because it would prevent the Plaintiff's premises from being seen. The Vice-Chancellor then commented on the evidence, and came to the conclusion that the Defendants had a *bonâ fide* intention to enlarge the laybye, and that the road which the Plaintiff proposed to substitute would be longer and less convenient for the Plaintiff, and that, therefore, he could not complain of having more road to repair. The bill must, therefore, be dismissed with costs.

(2) 34 L. J. (Ch.) 401; 11 Jur. (N. S.) 380.

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Lord CHELMSFORD, L.C., after stating the facts, continued:—

The complaint as to the intended erection of the gasometer may be very shortly disposed of. One ground was put forward, but not very strongly insisted upon. It was said that the Plaintiff, carrying on his business, and having a board exhibited to indicate the materials in which he dealt, the erection of the gasometer would obstruct the view of his premises, and so be likely to deprive him of customers, which, of course, must mean only chance customers who might be attracted by the board. The good sense of the counsel restrained them from pressing this point very far. I suggested, in the course of the argument, that if the building of a wall which merely intercepts the prospect of another, without obstruction to his light and air, is not a legal injury, it was very difficult to see how a building, which merely obstructed premises from the view of passers-by, could be the subject of an action. Indeed, the whole of the case with respect to the gasometer was virtually abandoned in the argument for the Plaintiff, and it was, in fact, conceded that, if a small gasometer had been erected without interfering with the road, it might not be such a thing as the Plaintiff could have prevented, but if it cannot be built without interfering with the Plaintiff's road, he has a right to avail himself of the objection to it.

The breaking up of the road, therefore, is really the substantial question to be considered.

The Plaintiff contends that the Defendants had no right to break up any portion of the road, except that part of it which was *bonâ fide* wanted for the purpose of the extension of the laybye, and he says that the proposed extension of the laybye was an afterthought of the Defendants merely used for getting possession of the road.

I think there is no doubt that, under the lease, there is no power to interfere with the road in question, except for the extension of the laybye; but I am clear that, for this purpose, the whole of the roadway may be removed. If the Defendants have a right, as undoubtedly they have, to remove the road, if they require it for the extension of the laybye, and they are really going to extend it, I do not see how the *bona fides* of the Defendants can enter into

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the question. Assuming that they never would have thought of extending the laybye unless it had been necessary to enable them to acquire a right over the road, still, if the alteration of the road was of sufficient importance to them to make them determine upon an extension of the laybye, which they would not otherwise have considered necessary, what legal, or even moral, objection can there be to their thus placing themselves in a condition to avail themselves of the covenant in the lease?

But the Defendants' case does not rest on such grounds as these. It is sworn by their engineer that it is necessary to divert the road in order to admit of the Defendants extending the laybye, which they are *bonâ fide* desirous of doing for their general purposes, particularly for facilitating the landing of pipes and other goods there, which, he says, is absolutely necessary for their business, and is not a mere scheme or device. It is difficult to imagine a stronger assertion of the extension of the laybye being actually required for the beneficial use of the company. The Plaintiff, however, insisted that this was insufficient, and Vice-Chancellor *Kindersley's* opinion in *Flower* v. *London, Brighton, and South Coast Railway Company* (1) was referred to. The affidavit of the engineer in this case does not at all resemble that which was produced to the Vice-Chancellor in the case cited, but the difference between a case where land may be taken against a person's will by force of an Act of Parliament, and one where, under a covenant by one person, his property may be taken at the discretion of another, is so obvious that it need not be insisted upon. I think it was entirely in the power of the gas company to enlarge the laybye at their free will and pleasure, and that, having determined to do so, their power over the road in question followed as a consequence.

I will merely add a word as to the equity which was insisted upon as entitling the Plaintiff to an injunction. Where is the irreparable mischief to the Plaintiff which calls for the prompt interference of the Court? As far as an inspection of the plan assists the judgment, the Plaintiff has a road a little longer than that which he is entitled to under the lease, and apparently as commodious as the former. If the Defendants had no power to

(1) 2 Dr. & Sm. 330.

break up the road, the Plaintiff would certainly have a right to maintain an action to recover such damages as he would be entitled to for deprivation of the one road and the substitution of the other, but not to anything more. I am clearly of opinion that the decree of the Vice-Chancellor is right, and ought to be affirmed, and the appeal must be dismissed, with costs.

Solicitor for the Plaintiff: Mr. *F. R. Smith.*

Solicitors for the Defendants: Messrs. *Wilde, Rees, Humphrey, & Wilde.*

L. JJ.
1866
July 17, 18, 23; *Dec.* 18.

DE HOGHTON *v.* MONEY.

Specific Performance—Champerty—Relief against Persons not parties to the Contract.

The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity.

A purchaser cannot, before completing his contract, enforce any equities attaching to the property against persons not parties to the contract. Therefore, where a purchaser filed a bill for specific performance, and added as Defendants persons claiming under a previous agreement which the bill sought to impeach:—

Held (affirming the decision of the Master of the Rolls) that the bill could not be sustained.

THIS was an appeal from a decision of the Master of the Rolls, reported Law Rep. 1 Eq. 154.

The Plaintiff, Sir *Henry De Hoghton*, was the honorary colonel of the 6th *Tower Hamlets Rifle Volunteers*, and the Defendant *George Henry Money*, was the lieutenant-colonel, the Defendant *St. Pierre Butler Hook*, one of the captains, and the Defendant *George Cotton*, an ensign of the same regiment.

The Defendant *Cotton* was also the landlord of the *Royal Standard Tavern, Hoxton*, in the immediate neighbourhood of the head-quarters of the regiment; and adjoining the tavern was a small triangular piece of land, a little under half an acre in extent, which was very suitable for a drill-ground. In 1861, *Cotton* became the purchaser of the residue of the term of years on which this plot of ground was held, terminating on the 22nd of June, 1897, at the price of £500, the rent being merely nominal.

Ever since August, 1861, there had been negotiations between the Plaintiff, as colonel of the regiment, and the Defendants *Cotton* and *Money*, for the purchase of the plot of land for the use of the regiment. In these negotiations, the Plaintiff alleged that *Money* acted as his agent. On the 22nd of February, 1862, the Plaintiff wrote to *Money*, expressing his willingness to purchase the lease from *Cotton*, and to re-let it to the regiment; and on the same day *Money* drew up, and procured *Cotton's* signature to, an agree-

ment of that date, whereby *Cotton* agreed to sell to *Money* his interest in the land, the purchase to be completed on the 26th of the same month. *Money* informed the Plaintiff of the execution of this agreement, and asked him for a cheque for the purchase-money, and the Plaintiff accordingly, in a letter dated the 2nd of March, sent him a cheque for £536. *Money* did not pay this cheque to *Cotton*, and the agreement was not carried into effect, in consequence, as it appeared, of some objections taken to it by the Defendant *Hook*, who was acting as solicitor for *Money*, and the cheque was returned to the Plaintiff.

On the 11th of March, 1862, *Cotton* wrote and sent to *Money* a letter in which he expressed his willingness to give to the regiment the full and entire use of the piece of land for the residue of the lease, if the regiment should last so long, and should require it for that period, upon the understanding that the regiment, from its own funds or otherwise, should level the piece of land and prepare it for a proper drill-ground, for which purpose only it was to be used; and he further promised to give £200 for the purpose of building an armoury and mess-room. All the covenants of the lease were to be fulfilled, and all repairs done by the regiment, and *Cotton* was to receive £1 a year as an acknowledgment that the lease still belonged to him. On the payment of £1 in advance, *Money* was authorized to consider that the letter at once gave him full right and legal title to use the piece of ground as effectively, and to all intents and purposes, as though a regular lease had been executed (1). It appeared that this letter was written at the instigation of Mr. *Grissell*, another officer of the corps. On receiving it, the Defendant *Money* signed it himself, and caused his signature to be attested, and he afterwards had the document stamped as a lease. The regiment took possession of the ground, and began to level it and use it as a drill-ground, soon after the date of the letter, and the annual rent of £1 was regularly paid up to the year 1864.

On the 24th of May, 1864, the Plaintiff entered into an agreement with *Cotton* for the purchase of the piece of land in question, and *Cotton's* entire interest therein, "without any reservation whatsoever, except as to a disputed right claimed by Lieutenant-

(1) The letter is given at length in the previous report; Law Rep. 1 Eq. 154.

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Colonel *George Henry Money*, in respect of a certain letter addressed to him by Mr. *Cotton*, and dated on or about the 11th of March, 1862," at the price of £550, and *Cotton* also agreed to permit the free use of his name, and to afford every facility in bringing actions, or filing bills in Chancery, or in any other proceedings which the Plaintiff might deem advisable to institute, for the purpose of setting aside the letter of the 11th of March, 1862, or any rights claimed by the Defendant *Money*, either for himself, or on behalf of the regiment, thereunder, and also that he would accept no further rent from the regiment.

By an indenture dated the 10th of June, 1864, the Defendant *Money* purported to convey the same piece of land to the Defendant *Hook* and himself, as trustees for the regiment.

On the 20th of July, 1864, the bill was filed. It alleged, amongst other things, that the letter of the 11th of March, 1862, was obtained from *Cotton* by concealment, surprise, and improper influence, and was therefore void. It prayed that the rights and interests of the parties in and to the said piece of land might be ascertained and declared; that it might be declared that the letter of the 11th of March, 1862, conveyed no estate or interest to the Defendant *Money*, or any other person, and was intended by *Cotton* to operate only as a license, revocable at pleasure, to the said regiment to use the said land as a drill-ground, and that the same was improperly obtained, and was void and of no effect, and ought to be delivered up and cancelled; and that the indenture of the 10th of June, 1864, might be declared void, and delivered up to be cancelled; that the agreement of the 24th of May, 1864, might be decreed to be specifically performed; and that the Defendants might be ordered to execute a proper conveyance of the land to the Plaintiff, free from the claim of the Defendant *Money*.

The Defendant *Cotton* made no opposition to a decree as far as he was concerned.

The Master of the Rolls considered that the agreement contained in the letter of the 11th of March, 1862, was a voluntary agreement, but held that the Plaintiff, although a purchaser for valuable consideration, was not entitled to have it set aside. He therefore made a decree for specific performance against *Cotton*, and dismissed the bill with costs against the Defendants *Money* and *Hook*.

From this decision the Plaintiff appealed.

Mr. *Jessel*, Q.C., and Mr. *Downing Bruce*, for the Plaintiff:—

The letter of the 11th of March, 1862, was obtained by the Defendant *Money* surreptitiously, at the time when the Plaintiff considered that he was acting as his agent; and the Defendant took advantage of his position as commanding officer to induce *Cotton* to write it. It ought, therefore, to be set aside: *Cooke* v. *Lamotte* (1). This is not simply a bill for specific performance; it is a bill by an equitable owner to obtain a declaration as to his rights, and to enable him to obtain possession. Such a bill may be maintained although the person having the legal estate is willing to convey: *Vernon* v. *Wright* (2); *Daking* v. *Whimper* (3).

Mr. *Stock*, for the Defendant *Cotton*, took no part in the argument.

Mr. *Selwyn*, Q.C., and Mr. *Simpson*, for the Defendants *Money* and *Hook*:—

The Defendant *Money* was the commanding officer of the regiment, and all property for the use of the corps was vested in him. The agreement was, therefore, properly made with him, and there was good consideration for the agreement in the advantage which *Cotton* hoped to reap from the use of the ground by the regiment. The contract which the Plaintiff now seeks to enforce is void for champerty and maintenance; it was the purchase of a right to set aside the agreement with *Money*. There was no other object in the contract. But, independently of this objection to the suit, *Money* and *Hook* are improperly made parties to the bill. They were not parties to the contract, and claim independently of it: *Tasker* v. *Small* (4).

Mr. *Jessel*, in reply.

Dec. 18. The LORD JUSTICE KNIGHT BRUCE having resigned

(1) 15 Beav. 234.
(2) 7 H. L. C. 35.
(3) 26 Beav. 568.
(4) 3 My. & Cr. 63.

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his office before giving judgment in this case, the judgment of the Court was, by the consent of the parties, given this day by

SIR G. J. TURNER, L.J., who, after stating the facts as mentioned above, and referring to the pleadings, continued :—

The evidence in the cause consists of the correspondence and documents to which I have referred, and of several affidavits. The Plaintiff has filed an affidavit verifying, in effect, the allegations of the bill. There are besides, an affidavit of the Defendant *Cotton*, and the depositions of two witnesses, referring mainly, if not wholly, to the conduct of the Defendant *Money* towards the Defendant *Cotton*, a part of the case into which it does not seem to me to be necessary to enter. It may be right, however, to observe, that I have no doubt upon the evidence that the Plaintiff entered into the agreement of the 24th of May, 1864, with full notice of the letter of the 11th of March, 1862. Upon the hearing of the cause before the Master of the Rolls, his Lordship dismissed the bill against the Defendants *Money* and *Hook*, with costs, and decreed a specific performance against the Defendant *Cotton*. The appeal before us is by the Plaintiff, from so much of the decree as dismissed the bill against the Defendants *Money* and *Hook*, with costs.

The first point to be considered upon this appeal seems to me to be, upon what ground the Appellant's claim to relief in this suit is founded by the bill in this cause, and I think it must be taken to rest wholly upon the agreement of the 24th of May, 1864. It is, indeed, alleged by the bill that the Defendant *Money* became the agent of the Plaintiff for the purpose of paying the £536 to the Defendant *Cotton*, and of completing the arrangement made by the agreement of the 22nd of February, 1862; but the bill does not seek the specific performance of that agreement, nor would it be consistent with the allegations and prayer of the bill that such relief should be given, for the bill states and prays the specific performance of the agreement of the 24th of May, 1864, which differs in many respects from the agreement of February, 1862, which the Defendant *Money* is alleged to have entered into as the Plaintiff's agent. This alleged agency, therefore, does not seem to me to bear upon the case further than as it may bear upon it when

taken in connection with the agreement of the 24th of May, 1864, in which point of view it falls within the observations I shall presently make.

Taking the Plaintiff's case, then, to rest upon the agreement of the 24th of May, 1864, the first question we have to consider is, whether that agreement is one of which specific performance ought, under the circumstances of this case, to have been decreed by this Court, for, if not, the equity of this bill, so far as it rests upon specific performance, drops to the ground. That the Court has decreed specific performance against the Defendant *Cotton*, who has not appealed from the decree, cannot alter the case as against the other Defendants against whom the bill has been dismissed. Ought then the Court, under the circumstances of this case, to have decreed the specific performance of this agreement? In my opinion, it ought not. I do not say that what appears in this case amounts in strictness to champerty or maintenance, nor do I even say that there may not be cases in which a purchaser who has completed his contract may be well entitled to impeach a title founded upon fraud committed upon his vendor; but I do not hesitate to say that, in my opinion, the right to complain of a fraud is not a marketable commodity, and that if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon this Court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savours of it too much for this Court to give its aid to enforce the agreement.

Looking to the Plaintiff's own statement, contained in the bill, and in his affidavit, I am satisfied that this agreement was entered into for the purpose which I have indicated, and if, therefore, this case had rested upon this ground alone, I should have thought that this bill was proper to be dismissed. That the Plaintiff, in entering into this agreement, intended to do what, in his view of the case, was right to be done for the Defendant *Cotton*, I see no reason whatever to doubt, but this cannot, I think, alter the effect of the agreement, or render it proper for this Court to enforce it.

The case, however, does not rest here. Assuming the agree-

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ment to be free from the objection to which I have referred, there is still this difficulty in the case. The Defendants against whom this bill has been dismissed, and against whom this appeal insists that it ought not to have been dismissed, were not parties to this agreement. They were entire strangers to it, claiming under an adverse title, and I take it to be well settled, both upon principle and authority, that a mere stranger claiming under an adverse title, cannot be made a party to a suit for specific performance. There is no equity against him independently of the agreement, and the agreement to which he was not a party cannot create such an equity. *Tasker* v. *Small* (1) seems to me to be decisive upon this point.

It was attempted, on the part of the Plaintiff, to distinguish this case from *Tasker* v. *Small*, but the argument failed to satisfy me that in principle there was any distinction between the cases. It was argued for the Plaintiff, that, independently of the right to specific performance, he was entitled to come to this Court to have the rights in the land, and the effect of what is called the letter or license of the 11th of March, 1862, declared, but the Plaintiff has no interest in the land except under the agreement; and here again his case is met by *Tasker* v. *Small*, in which case it was distinctly laid down that a purchaser cannot, before his contract is carried into effect, enforce against strangers to the contract equities attaching to the property, a rule which, as it seems to me, is well founded in principle, for if it were otherwise, this Court might be called upon to adjudicate upon questions which might never arise, as it might appear that the contract either ought not to be, or could not be performed. The bill, in this case, asks that it may be declared that the so-called letter or license of the 11th of March, 1862, conveyed no estate or interest to the Defendant *Money*. That is a question into which I do not enter. If the Plaintiff is right upon it he may complete his contract with *Cotton*, and proceed at law to enforce his rights. All that we have to decide is, whether this bill was properly filed against the Defendants *Money* and *Hook*. If it was not, the case is not within Mr. *Rolt's Act*, and we have nothing further to do with it. For the reasons which I have given, my opinion is, that this bill was

(1) 3 My. & Cr. 63.

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improperly filed against these Defendants, and was, therefore, properly dismissed against them, and I think this appeal should be dismissed with costs.

Solicitor for the Plaintiff: Mr. *W. Compton Smith.*

Solicitor for the Defendants *Money* and *Hook:* Mr. *St. Pierre Hook.*

Solicitor for the Defendant *Cotton:* Mr. *F. C. V. Pike.*

L. JJ.
1867
Jan. 11, 14.

In re BARNED'S BANKING COMPANY. *Ex parte* THORNTON.

Company—Winding-up—Registration of Petition as a Lis pendens—Companies Act, 1862, *s.* 114.

The 114th section of the *Companies Act,* 1862, does not authorize the registration of a Petition for winding up a company as a *lis pendens* against the individual contributories.

Order of the Master of the Rolls reversed.

8 Ch 749

THIS was an appeal from a decision of the Master of the Rolls, who had refused an application by the Appellant, Mr. *Joseph Thornton,* to have the registration of the Petition for winding up *Barned's Banking Company* as a *lis pendens* against him vacated.

The Petition for winding up the company was presented on the 27th of April, 1866, and the order for winding up was made on the 8th of May. On the 22nd of May, the provisional liquidator, having previously obtained leave in the Chambers of the Master of the Rolls to register the Petition as a *lis pendens,* under the 114th section of the *Companies Act,* 1866 (1), against such of the contributories as he might think fit, registered the Petition against the Appellant, whose name had been placed on the list. The Appellant, who disputed his liability as a contributory, ap-

(1) 25 & 26 Vict. c. 89. The 114th section is as follows:—"Any Petition for winding up a company by the Court under this Act shall constitute a *lis pendens* within the terms of the Act passed, &c. (*Purchasers Protection Act,* 2 & 3 Vict. c. 11), provided the same is duly registered in manner required by such Act concerning suits in equity.

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In re BARNED'S BANKING COMPANY. *Ex parte* THORNTON.

plied to the Master of the Rolls for an order directing the official liquidators, who had been subsequently appointed, to vacate the registration. His Lordship, however, refused the application (1).

Mr. *Baggallay*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Fischer*, for the Appellant:—

Independently of the construction of the Act, the registration is irregular. The provisional liquidator, as representing the company, was in the position of a Defendant, and the contributories are in the position of co-Defendants. One Defendant cannot register the suit against his co-Defendants. Again, the Petition was registered after the winding-up order had been made. It is

(1) The grounds upon which his Lordship refused the application will appear from the following extract from his judgment. "The only ground upon which the motion can be made before me is this—that the case does not come within the Act, and the contributory is not a party to the *lis pendens* which is sought to be registered against him. Now, who are the parties to a Petition for winding up? I apprehend that all the members of the company are parties to it. . . . . In this case, the Petitioner has presented a Petition for winding up, which, if I had made an order in the matter, would have the effect of a decree against every person who is a member of the company. I do not go into the question of whether the contributory is properly a member, or has a right to be struck off or not. That is a matter for the Petitioner to determine himself; and it would be a perfectly novel application, in an ordinary suit, where *A.* sued *B.* and *C.*, for *C.* to say, 'you have no case against me, and yet you have registered a *lis pendens* against me.' How can the Court go into that inquiry at all? The Plaintiff does it on his own responsibility, and considers whether he has such a case as entitles him to a *lis pendens*. I do not mean to say, that if this were used oppressively against some person, where there was no case in existence against him, the person against whom a *lis pendens* was registered, might not have an action for damages against the party who had thought fit to register a *lis pendens* without cause against him. This Court cannot go into that. This Court cannot examine whether the registration is a proper one or not. The Act of Parliament expressly states, that Petitioners for the winding up of companies shall be at liberty to give this notice; and the notice obviously would be nothing at all if it were merely to say this to the public, 'It is a notice that we claim something against all the members of the company, and yet we do not specify the names of any one or two of them in particular whom we more especially seek to affect.' I am of opinion, therefore, that this registration is perfectly proper in this sense, that I cannot remove it; but I abstain from giving any opinion whatever as to the effect of it, whether it will have the slightest effect against this gentleman's estate, or prevent anybody from safely advancing money to him upon it."

no longer therefore, a *lis pendens*, for the order is in the nature of a final decree. The Act contemplated only *interim* registration.

The object of the 114th section of the *Companies Act*, 1862, was to place a winding-up Petition on the same footing as a suit to wind up a partnership, and such a suit is never registered against the partners. A suit can only be registered as a *lis pendens* against a Defendant if it seeks to affect some specific estate in his possession; and the statute, 2 & 3 Vict. c. 11, s. 7, under which a *lis pendens* is registered, provides for the registration of the name of the person "whose estate is intended to be affected" by the suit. It does not extend to a suit which merely seeks to establish a debt against the Defendant: *Kinsman* v. *Kinsman* (1); *Bellamy* v. *Sabine* (2).

If the registration in this case is good, the results would be very oppressive in many cases. The Appellant disputes his liability as a contributory, and may be proved to be a mere stranger to the company; and yet, by this proceeding, he is prevented from dealing with his estates. It would be a great hardship if persons who are strangers, as well as paid-up shareholders, should have a cloud thrown upon their titles by any discontented creditor or shareholder who might file a Petition.

Although a liquidator, acting *bonâ fide*, may be protected against proceedings for damages, yet the Court has power to redress the injury by ordering the registration to be vacated.

Mr. *Selwyn*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the official liquidators:—

The liquidators have not acted in this case in any way different from the ordinary practice pursued in winding-up cases. The creditors' remedies at law are suspended by the proceedings in the winding-up, and if the Petition is not registered, there would be danger of the contributories converting their real estate into money, and evading their liability. It is the duty of the official liquidator to take precautions, and he is protected in what he does *bonâ fide*: *Gibbs* v. *Pike* (3).

(1) 1 Russ. & My. 617. (2) 1 De G. & J. 566. 3 Jur. N.S. 943.
(3) 9 M. & W. 351.

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The official liquidator is not in the position of a co-Defendant, but acts as the officer of the Court. The Petitioner is in the position of the Plaintiff, and all the contributories are to be considered parties to the record. There is no ground for the argument that the *lis pendens* is at an end on the vacating of the order. That order is not like a final decree, but is in the nature of a decree for inquiries.

A partnership suit may be registered as a *lis pendens* against the partners, in order to affect the partnership estates in their hands, although it would be inoperative as to estates which do not belong to the partnership. So here, some of the property of the company may be in the hands of contributories. The question is not now as to the effect of the registration, which will be discussed at a future stage. If the Appellant establishes his freedom from liability, the registration will be nugatory against him, and he has no reason to complain. The only question now is, whether it was intended by the 114th section of the Act that a Petition should be registered against contributories. If the 114th section does not apply to the real estates of contributories it is useless; for no such safeguard was needed with respect to the property of the company, the 153rd section preventing all dealing with it. Again, the 118th section relates to the case of contributories fraudulently removing or concealing their personal property; but there is nothing to prevent their parting with their real estate, unless the Petition can be registered as a *lis pendens*.

SIR G. J. TURNER, L.J.:—

It is quite obvious that if the course which has been taken in this case, and which we understand to have been taken in other cases, of registering a Petition for winding up a company against each person who is, or may be supposed to be, a contributory, is to prevail, inconveniences of the most oppressive description must arise in all cases in which orders for winding up companies are made — inconveniences which lead to the conclusion that the Legislature cannot possibly have intended, by the general words which are contained in this Act of Parliament, to have made an enactment having such oppressive and extensive operation. The construction, therefore, to be put upon this section of the Act, is

plainly not a construction to be extended—it must be limited by the purposes and by the words of the section. Now when we look to the purposes and the words of the section, the words are these: [His Lordship read the section.]

Who are the parties upon proceedings for winding up a company? The Petition is to wind up the company. It may in its result affect the individual members of the company, but it does not necessarily affect them, for no order may be made upon it. It may be presented by the creditors of the company, or by the company itself. Who are the parties if it be presented by the company? Again, what is the natural construction of the words, "a Petition for winding up the company shall constitute a *lis pendens*," but that it refers to a litigation between somebody and the company, and, therefore, that it must mean, *primâ facie* at least, that it is against the company as a litigant party that the *lis pendens* is to be registered? That seems to me to be plainly the *primâ facie* construction of the Act.

Now, it has been said that there may be cases in which the real estate of the company may be in the name of one of the contributories; and other cases have been put in which it is possible that property of the company in the hands of the contributories may, or might, be reached by the proceeding on the Petition for winding it up. But the question we have to consider is, whether, upon the general words which are contained in this section of the Act of Parliament, the Legislature could intend to refer to those extraordinary cases which might arise, or whether the words of the Act of Parliament do not point to the ordinary and common case; whether we are to hold that, because there may possibly be cases in which real estate of the company might be affected in the hands of a contributory by the registration of a *lis pendens*, therefore the construction of this section is to be that, in order to provide for those extraordinary cases, there should be a registration of a *lis pendens* against every contributory of the company. I cannot think that any such intention could have been entertained by the Legislature. Had it been entertained, I think it is quite clear that it would have been more clearly and plainly expressed in the Act. There is not, so far as I can see, any inconvenience arising to the company which would render it neces-

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sary to put upon the Act the extended construction contended for. Suppose any of the extraordinary cases to exist which it has been said may happen in the course of the winding up of these companies, are the companies without remedy in those cases? Would it not be quite competent either to the official liquidator, or to the *interim* liquidator, to file a bill alleging that property of the company was standing in the name of a contributory of the company, and to claim that property on behalf of the company, and then to register the suit against the particular contributory against whom the equity is sought to be enforced? I may illustrate this by a case which I remember to have occurred some years ago, in which there was an appeal to the Privy Council from the Ecclesiastical Court—the case of *Blenkinsopp* v. *Blenkinsopp*. There an order was made for alimony, and a sequestration was issued by the Privy Council. The party affected, in order to avoid that sequestration, made a colourable alienation of his estate before the sequestration could be executed, and thereupon a bill was filed in this Court, and the act having been done for the purpose of avoiding the sequestration, this Court gave effect to the sequestration against the real estate (1). So here there may possibly be rights against the real estates of the contributories, if colourable alienations be made for the purpose of avoiding the operation of the Petition to wind up the company; but to say that, without any claim being made against the real estates of any of the contributories of the company, the Petition to wind up the company is to be registered against each contributory of the company, is a position which, in my judgment, with all respect for the Master of the Rolls, is quite incapable of being maintained. In an ordinary case of a partnership suit, where the whole accounts of the partnership are to be taken, and a decree is made against a Defendant, and he does not pay the money, there may be the means of enforcing that decree against his real estate, but nobody, I think, has yet entertained the idea that there could be any registration of a mere partnership suit, so as to affect the real estate of one of the partners.

But, if it be so in an ordinary case of partnership, could it be so here? The only claim which the company have against the contributory is in respect of calls, which the contributory is liable to pay;

(1) 1 D. M. & G. 495.

and those calls are, by the Act of Parliament, constituted debts due from the contributory to the company. Nobody has yet entertained, as I believe, the notion that a Petition to wind up could be registered against the debtors of a company. If it is good for registration against a contributory, by reason of his being a debtor to the company, it would seem to follow, as a necessary consequence, that it would be good against every debtor of the company. So, again, in the case of administering real and personal estate, where the Plaintiff wishes to take proceedings against a debtor to the estate, he cannot register the original suit against the debtor to the estate, but he must institute a new suit against the debtor, and then register the new suit which has been instituted against him.

It seems to me, therefore, that this registration against Mr. *Thornton* cannot be maintained, and that this order must be discharged, and directions given that the official liquidators take all necessary proceedings for vacating the registration of this *lis pendens* against Mr. *Thornton*, and that Mr. *Thornton* have all his costs out of the estate, both here and in the Court below.

SIR H. M. CAIRNS, L.J.:—

It has been contended in this case that no injury is done to an individual contributory, or to a person alleged to be a contributory, if it be the case that the *lis pendens* would not affect his property, and that therefore this Court should not interfere to remove the registration of the *lis pendens*. Now, I certainly cannot accede to that argument. It think it very clear that injury and hardship of the most extreme and cruel kind would be the result of registering a winding-up Petition as a *lis pendens* against the real estate of all the contributories, and I think that the Court should see distinctly and clearly that, assuming the persons on the list to be proved ultimately to be contributories, it is a right and proper step that the winding-up Petition should be registered as a *lis pendens*, before it should permit it to be so registered.

Now, there are two matters with regard to this Act of Parliament which, as it seems to me, are perfectly clear. In the first place, I think it is clear that the 114th section was not meant to create any new kind of *lis pendens*. It speaks of *lis pendens* as a

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technical expression well known, and takes up that which was the law with regard to *lis pendens*. It does not create any charge where a charge did not exist before; but assuming the existence of *lis pendens* as a doctrine of law well known, it proceeds to apply it to the case of a Petition for winding up a company.

The next thing which I think is clear under the Act of Parliament is this, it was absolutely necessary that there should be a provision with regard to registering a Petition for winding up, in order to bring up a Petition to the same position that a bill or information held under the old law. The old law with regard to a *lis pendens* would not apply unless there was a subpœna; and the Act of the 2 & 3 Vict. c. 11, expressly mentions the filing of a bill or information as one necessary ingredient in the creation of a *lis pendens*. It was therefore necessary that the Act of Parliament should provide, and it seems to me that it has provided, that a Petition for winding up should stand upon the same footing as a bill or information filed, but it has done nothing more.

Then the *lis pendens* being a technical expression well known, it seems to me to be perfectly clear that it always implied a claim of right, or a claim to charge some specific property. That always was a necessary ingredient in a *lis pendens*, therefore I asked Mr. *Cotton* whether he contended, on behalf of the official liquidator, that there was in the winding-up Petition, or springing out of it, any claim to specific property, or any claim to a charge upon specific property, not of the company, but of the individual contributories. Mr. *Cotton* answered very fairly, and he could not have answered otherwise, that he could not contend that there was at present any claim asserted, or any right of charge insisted upon, against the real property of the individual contributories. But Mr. *Cotton* said that there was some other purpose, or there might be some other purpose, which the official liquidator was not bound to define, for which the *lis pendens* would be useful, that is to say, that there was some undefined purpose which might be obtained by registering this *lis pendens*. Now, in the first place, I think that would not be a course which the Court would be willing to sanction,—to register a *lis pendens* upon the idea that it might hereafter, upon some imaginary or undefined purpose, be found to be useful. But in addition to that, I find an admission

that there is no charge asserted, no specific claim made, against the real property of the individual contributories, and that seems to me to be fatal to the registration, because the registration is made, and the Act of Parliament requires that it should be made, in a prescribed form, which is not a mere matter of form, but a matter of substance, specifying the Christian name, the surname, the place of abode, and the title, trade, or profession—of whom? "of the person whose estate is intended to be affected." It is not contended that there is a specific charge against the estate of the individual contributory, yet we are told that the *lis pendens* is to be registered for the purpose of affecting the estate of that individual contributory.

In addition to this, I certainly agree with my learned brother that the natural meaning of the words of the 114th section is this, that where the Act of Parliament speaks of a Petition for winding up a company, and declares that the Petition shall constitute a *lis pendens*, it is assumed that the proceeding is against the company, and the declaration, as I read it, is that the proceeding shall be a *lis pendens* against the company.

Then it was very much urged that, if that were so, there would be no meaning or object in the 153rd section, which declares in substance that all alienations of real or personal property of the company, from the date of the presentation of the winding-up Petition, shall be null and void. It was said that that section would be entirely useless if the 114th section was merely confined to registering a *lis pendens* against the company and the property of the company. Now, I think there are various answers that may be given to that argument.

In the first place, it might be sufficient to say that the 153rd section is, what we unfortunately too often find in Acts of Parliament, a repetition of that which, perhaps, to a certain extent, or to the whole extent, had been enacted by an earlier section. But I think there are various purposes which are answered by the 153rd section. In the first place, it deals with personal property, which the 114th section did not deal with at all. In the next place, it may have been the view of the Legislature that it would be fair that, if there was a desire to affect the real property of the company, there should be a registration of the *lis pendens* of the Peti-

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tion for that purpose, in order that a purchaser might be made aware of the proceeding which was pending, and might not find, without notice, that the alienation to him was declared to be a void and invalid alienation. Or it might be to meet the case, which very possibly might arise, of the company itself being a Petitioner for the winding-up order, and there being, therefore, a difficulty, for that reason, of registering the Petition as a *lis pendens*. I do not say that it would be, but it might possibly be, that the company themselves moving, and not being served with the Petition, it would be difficult, according to ordinary practice, to register that Petition as a *lis pendens* against a company which was itself a Petitioner. If so, there then would be no protection against alienations of real property of the company, except by virtue of the 153rd section. There may thus be reasons of greater or less weight why we have this supplementary provision contained in the 153rd section.

Then we were referred to the 118th section, which enables the Court, by analogy to the proceedings of the *Absconding Debtors' Act* (1), on proof being given that there is probable cause for believing that a contributory is about to quit the country, to cause the contributory to be arrested, and his books, papers, moneys, securities for moneys, goods, and chattels, to be seized. It was said that there was no mention in that 118th section of the real property of the individual contributory, and that, therefore, you were left to the 114th section, if you desired to prevent alienation of real property. Now, I own that the 118th section seems to me to lead to an argument of a very different description. It seems to me to have been the intention of the Legislature, when it deals with the case of individual contributories as distinguished from the case of a company, to deal with them as the law deals with all persons who are debtors, and who are sued as debtors, that is to say, with regard to their personal property, if a case is made out that they are about to abscond, or to make away with it, to enable it to be secured by the Court; but, with regard to their real property, to leave any alienation of that to stand upon the general law of the kingdom, which provides that alienation of real property, made with an intent to defraud creditors, may be impeached

(1) 14 & 15 Vict. c. 52.

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by those who are defrauded; but, if otherwise, that it shall stand upon its own footing, as property which was not subject to any charge, by reason of the circumstance that the owner of it owned, or was accountable for, a debt or sum of money.

I think, therefore, there is no foundation whatever (and the sooner the idea which is said to prevail is removed the better for all parties), for the idea that a winding-up order can, or ought to be, registered as a *lis pendens* against the estates of individual contributories. The official liquidators must at once take steps to vacate the registration, and the costs of Mr. *Thornton*, both below and here, will be paid out of the estate of the company.

Solicitors for the Official Liquidators: Messrs. *Freshfields & Newman.*

Solicitors for the Appellant: Messrs. *C. & H. Tahourdin.*

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MALLORIE'S CASE.

Company—Winding-up—Contributory—Executor—Acceptance of Shares.

The directors of a joint-stock company offered their reserved shares to shareholders, and the executors of deceased shareholders, in proportion to the amount of their shares. The form of application sent to the executors of one of the deceased shareholders was filled up by *M.*, who was a relation of the surviving executrix, without her authority; and he therein asked for new shares to be allotted to himself. The directors allotted the additional shares to the executors, but sent the notice of the allotment to *M.* *M.* wrote a letter thanking them for the shares, but did not pay the deposit on them. The company was shortly afterwards wound up:—

Held (reversing the decision of *Kindersley*, V.C.), that there was no complete contract between *M.* and the company that he should take the shares; and that he could not be placed on the list of contributories.

Dobson's Case (1) distinguished.

THIS was an appeal from an order of Vice-Chancellor *Kindersley* made in the winding up of the *Leeds Banking Company*, by which he settled Mr. *Thomas Peter Mallorie*, a spirit merchant, of *Leeds*, on the list of contributories in respect of five shares.

(1) Law Rep. 1 Ch. 231. 17 Jur. N.S. 965.

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The company was established under the provisions of the 7 Geo. 4, c. 46. The formation of the company, and the principal clauses of the deed of settlement, are stated in the report of *Fearnside and Dean's Case* and *Dobson's Case* (1). The directors having at their disposal 2660 unallotted shares, resolved to issue them to the old shareholders in the proportion of one share for every five shares, at £30 each, being a premium of £15 per share. They accordingly issued the circular of the 22nd of June, 1864, which is set out in the last-mentioned report, offering the old shareholders their proportion of the unallotted shares, and asking if they wished to have any more allotted to them in case any shares still remained undisposed of.

Matthew Mallorie, the uncle of the Appellant, *T. P. Mallorie*, was, at the time of his death the owner of ten shares in the company. He died in February, 1851, leaving three executors, the survivor of whom was his widow, who had subsequently married a Mr. *Bradley*. The shares were entered in the books of the company as belonging to the executors of *Matthew Mallorie*, and the notices were addressed to them. *T. P. Mallorie*, although not an executor, received the dividends for Mrs. *Bradley*, and his name was entered in the books of the company as the person to whom notices for the executors should be sent. Accordingly the circular of the 22nd of June, 1864, was addressed to the executors of *Matthew Mallorie*, but was sent to *T. P. Mallorie*. The latter gentleman considering that, not being an executor, he was not entitled to any of the new shares, did not answer the circular until after the fourteen days limited for application had elapsed. Shortly afterwards, however, he called on Mr. *Greenland*, the manager of the company, and spoke to him about certain shares of his deceased father, *John Mallorie*, which had been transferred to his legatees, when Mr. *Greenland* told him that shares could only be allotted to shareholders. Mr. *Greenland* then said that the shares were good things, being then at a considerable premium, and that if the Appellant would fill up the application attached to the circular which had been addressed to the executors of *Matthew Mallorie*, and write a special letter with it, he would see what could be done for him.

(1) Law Rep. 1 Ch. 231. 17 Jun 1865.

The Appellant accordingly, on the 13th of July, 1864, filled up the application in the following form :—

"In reply to your circular of the 22nd June, 1864, I agree to take two shares, being my proportion of allotment, and eight shares in addition, if I can have them on the terms stated in your circular.

"*Thomas P. Mallorie.*"

And he wrote at the foot of the application the following letter:—

"I regret my oversight in not filling up this and the other circular [alluding to the circular referring to the shares of his father *John Mallorie*], thinking I was not entitled to the preference shares as executor. I therefore beg you will allot me the above number as an old customer, and my family being old shareholders."

On the 14th of July, at a meeting of the directors, it was resolved "that to the shareholders who accept the allotment of shares and apply for further allotments, not exceeding one share for every five shares held by them, the number of shares applied for shall be allotted; and that to shareholders applying for future allotments of more than one additional share for every five shares, a further allotment of one share for every five shares shall be made."

It was also resolved "that the allotment of shares remaining undistributed shall be allotted according to the discretion of the manager and the two private directors."

On the 18th of July, 1864, the manager sent a letter, which was addressed to the executors of *Matthew Mallorie*, and delivered at the house of the Appellant, in the following words :—

"The directors of the *Leeds British Bank* have instructed me to inform you that they have allotted you three additional shares, for which you have applied, at the sum of £30 per share, in addition to the two shares previously accepted by you, making your number of new shares five." The letter proceeded to name the 1st of October as the day for paying the money.

The Appellant thereupon wrote to Mr. *Greenland* a letter, dated the 20th of July, in the following terms :—

"I beg to thank you for your kind allotment, and appreciate

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your consideration in the matter. I do not think I shall be able to pay for them before the named time, as I have bought very largely of 1863 brandies, which will all be to pay for this month, but if I can I will."

The bank stopped payment on the 19th of September, 1864, and an order for winding up the company was made on the 13th of October following. Mrs. *Bradley* gave no authority to the Appellant to accept the shares, and repudiated the transaction.

Under these circumstances, the Vice-Chancellor, Sir *R. Kindersley*, considered that *Dobson's Case* (1) was applicable to the present case, and that the shares were allotted to the Appellant, not as executor, but in his own right, and ordered that he should be placed on the list as a contributory in respect of them.

Sir *R. Palmer*, Q.C., Mr. *Baily*, Q.C., and Mr. *Wickens*, for the Appellant:—

There was no contract between the Appellant and the company. He applied for the shares in his own right, and the directors granted them to him in the character of an executor, which he did not fill. The directors had no power to grant them to him in any other capacity, and if they had, they did not profess to exercise it. The Appellant could not have enforced the allotment against the company, and, therefore, he was not himself bound; for there must be mutuality: *Addinell's Case* (2); *Liverpool Borough Bank* v. *Walker* (3). *Dobson's Case*, which was relied on by the Vice-Chancellor, has no application, for in that case *Dobson* had paid the deposit on the shares, and had become a shareholder; the only question was, in what capacity he was a contributory.

Mr. *Glasse*, Q.C., and Mr. *Cotton*, Q.C., for the official liquidator:—

The directors dealt with the Appellant as acting on behalf of the executors, and he dealt with them on the same footing. It was, doubtless, considered that he could get the consent of the executrix. In *Dobson's Case*, the executor acted in the same way; he did not intend to take the shares in his own right; and

(1) Law Rep. 1 Ch. 231. (2) Law Rep. 1 Eq. 225. (3) 4 De G. & J. 24.

yet the Court held he was personally liable. There is no difference in principle between the two cases.

But it may be contended that the directors offered the shares to the Appellant in his own right, which they had power to do under the resolution of the 14th of July, which gave them the disposal of the surplus shares. It is clear that the Appellant accepted the shares as so allotted when he wrote his letter of thanks to Mr. *Greenland*.

Sir *R. Palmer*, in reply.

SIR G. J. TURNER, L.J.:—

The sole question in this case seems to me to be, whether there was or was not a valid contract between the company and Mr. *Mallorie*, that he should become the owner of these shares. The facts of the case lie in a narrow compass. [His Lordship then stated the circumstances under which the Appellant filled up the application for the shares attached to the circular of the 22nd of June, 1864, and proceeded:—] Perhaps there might have been a little difficulty in knowing what was to be done in that case by reason of the words being "my proportion of allotment," if the matter had rested upon that letter; but the matter did not rest there, for at the foot of that letter Mr. *Thomas Peter Mallorie* writes in these terms:—"I regret my oversight in not filling up this and the other circular, thinking I was not entitled to the preference shares as executor. I therefore beg you will allot me the above number as an old customer, and my family being old shareholders in the bank." Nothing can be more clear, therefore, from that letter than that Mr. *T. P. Mallorie* did not mean to take these shares unless they were given to him, not by virtue of any character of executor, but as an old customer, and by reason of his family being old shareholders in the bank. It is impossible, therefore, to say that down to that point there was any perfect contract between the parties.

Then that is followed by the directors coming to a further resolution, by which they agreed that of the additional shares one share for every five shares should be offered to the old shareholders, and then, in the event of there being any surplus, they

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also resolved that the allotment of shares remaining undistributed should be allotted according to the discretion of the manager and the two private directors.

If the directors at that time had adopted the suggestion which was contained in this letter, and had said to Mr. *T. P. Mallorie*: "There are surplus shares beyond the one share for five shares which we have agreed to give; and beyond that one share for five shares, we, the manager and the two private directors, will give you the shares you ask for"—if they had taken that course, there might have been a perfect contract between Mr. *T. P. Mallorie* and the company; but the directors took no such course —no such course was taken on the part of the company. What was done was this. On the 18th of July, Mr. *Greenland*, on the part of the directors, wrote in these terms:—

"The directors of the *Leeds Banking Company* have instructed me to inform you that they have allotted you three additional shares for which you have applied, at the sum of £30 per share, in addition to the two shares previously accepted by you."

Then they say they cannot allot him more, and they allude to the time when the money was to be paid, and they address the letter to the executors of Mr. *Matthew Mallorie*. The offer on the part of Mr. *T. P. Mallorie* was: "I will take the shares, if I can have them as a customer;" but neither the directors, nor the manager, nor the private directors, adopt his proposal at all, but send an answer containing their own former resolution to give the shares to the executors of Mr. *Matthew Mallorie*. There the matter ended, except that on the 20th of July, 1864, two days afterwards, Mr. *T. P. Mallorie* writes to thank Mr. *Greenland* for the kind allotment of the new shares, and appreciates his consideration in the matter.

There are two ways in which this contract might be considered to have been made. In the first place, it might have been a contract by Mr. *T. P. Mallorie* to take the shares in his own name. That clearly was not the fact. Then there might possibly have been a contract by Mr. *T. P. Mallorie* to take the shares in the character of executor. It is quite clear that that was not intended by the parties at all, because Mr. *T. P. Mallorie's* original

proposition was that he should have them as a customer, and because his family were old shareholders. Then, beyond that, it would have altered the position of Mr. *T. P. Mallorie,* if he had taken the shares in the character of executor; nothing could have been done but to have put these shares into the names of the executors. On the one hand, the executors would not have taken the shares if the concern had turned out badly, and if the concern had turned out well, it is clear they never would have been guilty of such a breach of duty as to hand over the shares to Mr. *T. P. Mallorie,* who had no interest in the shares whatever. It appears to me, therefore, that the matter has altogether slipped through, and that there was no complete contract between these parties.

The case seems to have been considered by the Vice-Chancellor as falling to some extent within *Dobson's Case* (1); but I do not think that *Dobson's Case* has any application to the present case. In *Dobson's Case,* there was a complete contract by *Dobson;* he not only signed the agreement to take the shares, but he paid the money for the shares, and the sole question in *Dobson's Case* was, whether he, having signed the agreement as executor, and paid the money as executor, and taken a receipt for it as executor, was entitled as between himself and the other members of the company, to say it was the estate, and not himself personally, that was liable for the shares. We held that he could not be entitled to have the shares in the character of executor so as to make the estate liable as between him and his partners; that he could not, as between him and his partners in the concern, stipulate that the estate, and not he individually, should be liable. That was the principle upon which *Dobson's Case* proceeded. It does not seem to me that this case falls within that principle.

Upon the whole, therefore, I find myself unable to agree with the conclusion which the Vice-Chancellor has arrived at. I think that the order made by His Honour should be reversed, and that there should be no costs of this appeal.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion. The sole question in the case is, whether, at the date of the winding up of the company there was a complete

(1) Law Rep. 1 Ch. 231: 12 Jur. N.S. 60

L. JJ 1866. MALLORIE'S CASE.

contract to take these shares. If there was a complete contract, of course Mr. *T. P. Mallorie* is in the same position as if he had become, in the most formal way, and had been registered as, a shareholder in the company. We start in this case, and there is no dispute of facts, with a most important admission on the part of Mr. *Greenland*, the manager of the bank; for in stating his account of the interview which took place before the letter of the 13th of July, 1864, was written, he says he had a conversation with Mr. *Mallorie*, that he perfectly well knew that Mr. *Mallorie* was not the executor of his uncle; and he says, on Mr. *Mallorie* applying to him to have some shares: "I told him that I doubted whether he could have any, as the new shares were being allotted to shareholders only. He thereupon urged that his request ought to be considered, as he was an old and good customer of the bank. I believe that I thereupon said that I would see what could be done for him." From that statement there are two things perfectly clear. In the first place, that Mr. *Mallorie* was not claiming, or professing to claim, these shares as executor, but admitted that he had no right, under the resolution of the company, to get these shares. In the second place, that Mr. *Greenland*, not only did not make a contract at this time, or make a promise to give the shares; but told Mr. *Mallorie*, candidly, that he had no authority to do so, and that all he could do for him would be to find out whether the directors would consent to give him the shares upon the footing, not of being an old shareholder, or an executor of an old shareholder, but as a customer of the bank—in other words, as one of the general public.

Then the next step is on the 13th of July, when the letter which has been referred to was written, a letter which when taken, together with the additional note in the form of a postscript, amounts merely to this:—Mr. *Mallorie* stated to the company: "I cannot claim these shares as an executor. The time has passed within which the claim might be made, even if I were an executor; but I beg you will allot me these shares as an old customer, and my family being old shareholders in the bank." Now that was an offer made to the banking company, which they might have accepted, or which they might have declined, but, until accepted, of course no contract could arise. As far as the records of the company are

concerned, all that we find that was done afterwards was this:—On the 14th of July, the following day, a meeting of the directors was held, and, after some discussion, it was resolved that, to the shareholders who accepted the allotment of shares, and who made application for further allotments, additional shares should be allotted in proportion; and then it was also resolved that, as to the allotment of shares remaining undistributed, they should be allotted according to the discretion of the manager and the two private directors. That is to say, as regards those who had a right in the character of shareholders, or as representatives of shareholders, there was to be an allotment made without condition and without discretion; and then, after that was done, if there remained shares unallotted, the general public were to be considered; but that was to be done at the discretion of Mr. *Greenland*, and of the two private directors. So much for the resolution of the company. Now, what follows? Mr. *Greenland* wrote a letter on the 18th of July, addressed on the face of it to the executors of Mr. *Matthew Mallorie*, and he professes to write that letter by the instructions of the directors of the *Leeds Banking Company*. Now, I think the counsel for the official liquidator felt themselves naturally in a difficulty as to the kind of contract which should be supposed to flow from this letter, because the dilemma obviously is this: if this is a letter to be read literally, according to the wording of it—that is to say, a letter addressed to the executors of Mr. *Matthew Mallorie*, and making an offer to them—then, no doubt, that was a letter which was warranted by the terms of the resolution; but then, it was never accepted by the executors of Mr. *Matthew Mallorie*, and the present Appellant, Mr. *T. P. Mallorie*, is not one of those executors. If, on the other hand, you can get over the wording of the letter, and construe it as an offer made to Mr. *T. P. Mallorie* as an individual, and not as an executor of Mr. *Matthew Mallorie*, then that was an offer which Mr. *Greenland*, so far as we can see, was in no way warranted to make, and which the company had never expressed themselves willing to ratify.

But it is suggested that there might have been power under the latter part of the resolution to make the offer to Mr. *T. P. Mallorie* as an individual. I think that that suggestion is entirely met by looking at the extract from the share transfer-book which

L. JJ. 1866 MALLORIE'S CASE.

was submitted to us, from which it is perfectly evident that, with the exception of two or three names at the end, the distinction as to which makes the rest of the document more emphatic, the document is prepared upon the footing of being an allotment to shareholders, and representatives of shareholders, in the company, as a matter of right, assigning to the shareholders the quota of shares which they were entitled to as a matter of right under the resolution of the company. It seems to me, therefore, that no contract was created by the letter of the 18th of July, because there was no acceptance there, and no authority to accept Mr. *T. P. Mallorie* as an individual shareholder in the company.

Does, then, the final letter of Mr. *T. P. Mallorie*, thanking Mr. *Greenland* for what he had done, make any difference in the case? I think not. That letter must be read in one of two ways—either it is a letter of thanks to Mr. *Greenland* for allotting shares to the executors of Mr. *Matthew Mallorie*, in which case, of course, it does not advance the contest of the official liquidator here; or it is a letter thanking Mr. *Greenland* for having allotted shares to Mr. *T. P. Mallorie* individually, in which case it is a letter thanking him for doing that which he was not authorized to do. In neither view of the case, therefore, can any contract be spelt out of that letter.

I certainly have the less hesitation in differing in this case from the learned Vice-Chancellor, for whose great experience and accurate application of the principles of law no person has a more unbounded respect than I have, because, as I understand, His Honour was mainly influenced in the decision he arrived at by the circumstance, that his former opinion, expressed in *Dobson's Case* (1), had been overruled upon appeal in this Court. But when I look at *Dobson's Case*, I own it does not appear to me, for the reason my learned brother has stated, to be in any way a case governing the present.

I think, therefore, that the name of Mr. *Thomas Peter Mallorie* must be removed from the list. I think it is a case in which there ought to be no costs.

Solicitors for the Appellant: Messrs. *Torr, Janeway, & Tagart.*

Solicitors for the Official Liquidator: Messrs. *Freshfields & Newman.*

(1) Law Rep. 1 Ch. 231.

In re BRIDPORT OLD BREWERY COMPANY.

L. JJ.
1867
Jan. 12.

Company—Voluntary Winding-up—Extraordinary Resolution—Notices, Form of —Companies Act, 1862, *ss.* 51, 129.

Notice was given of an extraordinary meeting of shareholders in a company, "for the purpose of considering, and, if so determined on, of passing, a resolution to wind up the company voluntarily." The meeting passed a resolution "that it had been proved to the satisfaction of the company that the company could not, by reason of its liabilities, continue its business; and that it was advisable to wind up the same." No meeting was ever called to confirm this resolution:—

Held (reversing the decision of the Master of the Rolls), that this resolution was invalid as an extraordinary resolution under the *Companies Act*, 1862, s. 129, the notice not shewing that it was intended to propose a resolution that the company was unable, by reason of its liabilities, to continue its business, nor containing anything to shew that it was proposed to pass such a resolution for winding up the company as would not require confirmation by a subsequent meeting.

THIS case came before the Court by appeal Petition from two orders of the Master of the Rolls.

The *Bridport Old Brewery Company, Limited*, was registered as a limited company, on the 19th of August, 1864.

On or about the 22nd of September, 1866, the following notice was sent to the shareholders:—

"*Railway Arches, Belvedere Road, Lambeth,*
"22nd of September, 1866.

"Notice is hereby given, that an extraordinary meeting of the shareholders of this company will be held at the above offices on Tuesday, 2nd of October, 1866, at two o'clock P.M., precisely, for the purpose of considering, and, if so determined on, of passing, a resolution to wind up the company voluntarily, and, if deemed advisable, subject to the supervision of the Court, and also for the appointment of a liquidator or liquidators.

"By order,

"*Julius Smith*, Secretary."

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In re BRIDPORT OLD BREWERY COMPANY.

The meeting was held accordingly on the day above named, and the following resolutions were duly passed:—

"(1.) That it has been proved to the satisfaction of the company that the company cannot, by reason of its liabilities, continue its business, and it is advisable to wind up the same.

"(2.) That Mr. *James Williams*, of *Bridport*, be, and he is hereby, appointed liquidator, for the purpose of winding up the affairs of the company, and distributing the property."

No subsequent meeting was held to confirm this resolution, but the winding-up went on under it.

Two Petitions were presented in October, 1866, by different creditors, praying that an order for winding up might be made, and an official liquidator appointed, or that the voluntary winding-up might be continued, subject to the supervision of the Court.

On the 3rd of November, 1866, the Master of the Rolls made an order on both Petitions for continuing the voluntary winding-up under the supervision of the Court.

On the 6th of December, 1866, *R. Collis* and *T. Collis*, who had presented one of the above-mentioned Petitions, presented another Petition, alleging that the resolution to wind up was invalid, and praying that an order might be made for compulsory winding-up. The Master of the Rolls, on the 15th of December, 1866, dismissed this Petition with costs. *R. Collis* and *T. Collis* thereupon presented an appeal Petition, asking to have the three Petitions reheard, and the two orders of the 3rd of November, 1866, and the 15th of December, 1866, discharged, and to have the common winding-up order made. Evidence was adduced sufficient to ground a winding-up order.

Mr. *Baggallay*, Q.C., and Mr. *J. N. Higgins*, for the Appellants:—

The resolution was invalid. It might have been a good special resolution, such as is required by sect. 129, clause 2, of the *Companies Act*, 1862, if it had been confirmed in manner provided by sect. 51; but it was not so confirmed. Neither is it a good extraordinary resolution, for the notice did not specify that a resolution that the company, by reason of its liabilities, was unable to carry on business, would be proposed. Now the 51st section,

the first part of which, by virtue of the last paragraph of sect. 129, shews the requisites of an extraordinary resolution, requires that the notice shall specify the intention to propose the resolution. Any shareholder would suppose, from the notice here given, that it was intended to propose a resolution which would require confirmation by a subsequent meeting. Notices are required to comply strictly with the provisions of the Act: *Re Stearic Acid Company* (1). Here the variation was most important. A shareholder who objected to winding up the company might stay away from the first meeting, relying on being able to object to the confirmation at the next meeting. If the resolution is invalid, the liquidator will have no title, and cannot effectually deal with the assets, and a compulsory order for winding up ought to be made.

Mr. *Fischer* (Mr. *Jessel*, Q.C., with him), for the company and the liquidator, and Mr. *Rodwell* (Mr. *Selwyn*, Q.C., with him), for the directors:—

The resolution was effectual, the notice having given sufficient information of what it was proposed to do at the meeting, which is all that can be required. The Appellants, moreover, are bound by acquiescence. They concurred in the resolution for the voluntary winding-up; they presented a Petition recognizing it as valid; they concurred in an order continuing it under supervision, and the winding-up has gone on to a considerable extent under that order. As regards the dealing with the assets by the liquidator, his acts will all be valid under sect. 67 of the Act, and purchasers of the assets from him will get a good title.

Mr. *Baggallay*, in reply:—

A purchaser from the liquidator might resist specific performance on the ground that the liquidator has no title. At all events, there will be an uncertainty about his powers, which will act very disadvantageously in the realization of the assets, and so prejudice the rights of the creditors, and the Court will therefore order a compulsory winding-up, as authorized by sect. 145. The Court may, under the following section, provide for adopting what has been already done in the winding-up.

(1) 11 W. R. 980.

L. JJ. 1867 *In re* BRIDPORT OLD BREWERY COMPANY.

SIR G. J. TURNER, L.J.:—

The objection taken by the Appellants raises a serious question as to the title of the liquidator under the voluntary winding-up. Mr. *Rodwell*, indeed, contends that the 67th section of the Act gives validity to all sales made by him, and to all acts properly done by him, notwithstanding any invalidity in his appointment. I think, however, that this is not the true construction of that section, which, as it appears to me, means no more than that all proceedings taken by the liquidator before the invalidity of his appointment is shewn, shall be held valid; when his appointment has been shewn to be invalid, I do not think that it was intended by this section to give validity to his proceedings. I am therefore of opinion, that unless the resolution for a voluntary winding-up can be shewn to be valid and effectual, serious difficulties will arise in the way of the liquidator dealing with the assets.

The decision of this case, then, turns on the question whether the extraordinary resolution of the 2nd of October, 1866, was valid or not. The first part of this resolution is, that it had been proved to the satisfaction of the company, that the company could not, by reason of its liabilities, continue its business. But the notice did not state that an extraordinary resolution to wind up the company would be proposed; nor did it give any intimation that it was proposed to consider at the meeting the question whether the company was able to continue its business. Now it is evidently of great importance to shareholders that they should have proper notice what subjects are proposed to be considered at a meeting, and I do not think that in the present case they had such notice. I do not say that it was necessary to follow in the notice the precise terms of the *Companies Act*, sect. 129, clause 2; but it appears to me that the shareholders were entitled to have a notice which would give them to understand that it was proposed to pass an extraordinary resolution to wind up the company. It is of great importance that the steps taken in a matter of such consequence as the resolving to wind up a company should be perfectly regular, and in the present case I think that there was no sufficient notice; that the resolution to wind up was therefore

irregular, and that the usual order for compulsory winding-up ought now to be made.

L. JJ. 1867 *In re* BRIDPORT OLD BREWERY COMPANY.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion, and on the same grounds. If the proceedings are not taken regularly under the Act they are abortive, and the liquidator can neither make a good title on a sale of the assets, nor enforce payment of calls from the contributories. In the present case, it appears to me that the provisions of the Act have not been complied with; the notice which was given, though sufficient for the purpose of passing a resolution requiring confirmation, being insufficient for the purpose of passing a resolution requiring no confirmation.

Solicitors for the Appellants: Messrs. *Harrison, Lewis, & Co.*
Solicitors for the Respondents: Messrs. *Paine & Layton.*

Ex parte HARRISON.

In re BAILLIE & HARRISON.

L. JJ. 1866 *Dec.* 14.

Bankruptcy Act, 1861, *s.* 159—*Trading upon fictitious Capital—Debt without Expectation of being able to pay.*

Where a trader raises money by discounting accommodation bills, but does not negotiate the bills in the course of his trade, this is not trading by means of fictitious capital within the meaning of the *Bankruptcy Act*, 1861, s. 159.

Overdrawing an account current at a banker's, by a person in insolvent circumstances, does not in itself amount to contracting a debt without reasonable or probable ground of expectation of being able to pay the same, within the same section.

Post 652.

THIS was an appeal from an order made by Mr. Commissioner *Perry*, of the *Liverpool* District Court of Bankruptcy, suspending for two years the order of discharge of Mr. *Harrison*, a bankrupt, and refusing him protection.

Messrs. *Baillie & Harrison* carried on the business of manure manufacturers, at *Waverton*, near *Chester*, and in *Liverpool*. *Baillie*

L. JJ.
1866
Ex parte HARRISON.
In re BAILLIE & HARRISON.

resided at *Waverton*, and superintended the manufacture of the manure, while *Harrison* conducted the sales at *Liverpool*, and managed the financial part of the business. The firm appeared to have had very little capital, and *Harrison* obtained money for the business by procuring accommodation bills from various persons of no substance, and sending them to a Mr. *Tuxford*, in *London*, who discounted them at a rate averaging 20 per cent.

The bankrupt, *Harrison*, had also contracted a debt of £117 6*s.* 10*d.* to his bankers, Messrs. *Williams*, of *Chester*, by overdrawing his account. It appeared that he was in insolvent circumstances at the time, but he had subsequently paid in and drawn out considerable sums, although a balance to the amount mentioned still remained against him.

The Commissioners were of opinion that this conduct amounted to carrying on trade "by means of fictitious capital," and contracting a debt "without reasonable or probable ground of expectation of being able to pay the same," within the 159th section of the *Bankruptcy Act*, 1861, and accordingly made the order appealed from. The other partner, *Baillie*, obtained his order of immediate discharge, no opposition being made to it.

Mr. *Bacon*, Q.C., and Mr. *Yate Lee*, for the Appellant:—

Dealing in accommodation bills is not in itself reason for suspending the certificate: *Ex parte Hammond* (1). The conduct of the Appellant, in obtaining money from *Tuxford* by transmitting him accommodation bills, was merely a mode of borrowing money from him. The bills were not negotiated as trade bills. The debt to the Messrs. *Williams* was merely the ordinary case of a customer overdrawing his account with his banker.

Mr. *De Gex*, Q.C., and Mr. *Cutler*, for the assignees:—

The case of *Ex parte Hammond* was decided upon the statute of 1849, in which the words "fictitious capital" did not occur, and the only question there was, whether there was fraud or misrepresentation. The persons on whom *Harrison* drew the bills were persons of no substance, and who owed no debts to the firm: and

(1) 6 D. M. & G. 699.

the bills were discounted at exorbitant rates. As to the debt to the banker, the account shews that *Harrison* was insolvent at the time the debt was contracted.

SIR G. J. TURNER, L.J.:—

The Appellant in this case seeks to discharge the order of the Commissioner, who has suspended his certificate for two years. The grounds on which the Commissioner proceeded were two: first, that the bankrupt had traded on fictitious capital; secondly, that he had contracted a debt to his banker without a reasonable expectation of payment. There is no point of law in dispute in this case; the only question is, whether the bankrupt has committed these offences within the meaning of the statute.

First, then, as to trading on fictitious capital. I do not mean to say that there are no cases in which dealing in accommodation bills may amount to trading upon fictitious capital within the meaning of the Act. In general, when a man draws accommodation bills, he may be said to be trading on fictitious credit, rather than on fictitious capital. But there may be cases which would come within the meaning of the Act, as where a trader pays money to persons to induce them to accept accommodation bills, and then negotiates them as if they were ordinary trade bills. But in the present case the bankrupt did not use the bills for his trade, but gave them to *Tuxford*, and carried on his trade by means of the money which he obtained by his discounting them. That was, in truth, nothing more than that *Tuxford* had agreed with the bankrupt that if he would indorse bills to him, he would advance the bankrupt money for his trade. I cannot think that this was trading with fictitious capital.

The other ground was, that the bankrupt had incurred the debt to Messrs. *Williams* without reasonable expectation of repayment. But, in truth, it was nothing more than the ordinary case of a man overdrawing his account. He did not obtain a loan from the banker on the faith of any misrepresentation; but did what everybody may occasionally do, overdraw his account. I do not think that comes within the offence contemplated by the Act. The order must therefore be discharged.

L. JJ. 1866 *Ex parte* HARRISON. *In re* BAILLIE & HARRISON.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion. So far as regards the debt to Messrs. *Williams*, I think that when we ascertain the true character of the transaction, we cannot say that it amounted to contracting a debt without reasonable expectation of being able to repay it.

As to the other ground, so far as I know, this is the first time that the Court has been called on to put a construction upon the words "carrying on trade by means of fictitious capital." It is difficult to say what would amount to such trading. I should say that the words might apply to a case in which a trader obtains acceptances when there was no real transaction, and then gets them discounted under circumstances which would lead persons to think that they represented real transactions: as, for instance, by adjusting the sums so as to include shillings and pence, as if they were ordinary trade debts. I have an impression that such a case might be treated by the Court as trading upon fictitious capital; but I have no doubt that the present case is not within those words. The bankrupt looked to *Tuxford*, as a man of capital, to help him to carry on his business. This might have been done by means of a direct loan; but the bankrupt did it indirectly. He sent bills to *Tuxford*, who discounted them, and he used the money in his trade. Trading on borrowed capital may be censurable, but it is not the offence for which the bankrupt's certificate has been suspended. The order must be discharged. The costs of both parties to come out of the estate.

THE LORDS JUSTICES made an order for the immediate discharge of the bankrupt.

Solicitor for the Bankrupt: Mr. *Etty, Liverpool.*
Solicitors for the Assignees: Messrs. *J., T., & R. Gole.*

Ex parte TILSTON.

In re TILSTON.

L. JJ.
1866
Dec. 14.

Bankruptcy Act, 1861, *s.* 110—*Arrangement with Creditors—Discharge—Final Examination.*

Where a bankrupt who has made an arrangement with his creditors under the 110th section of the *Bankruptcy Act*, 1861, applies for his discharge, it is not necessary that he should conform to all the formalities of the final examination; it is sufficient if he renders a full discovery of his property. And *semble*, such discovery may be dispensed with in cases where the terms of the arrangement render it unnecessary.

THIS was an appeal from a decision of Mr. Commissioner *Perry*, of the *Liverpool* District Court of Bankruptcy.

The Appellant, *W. Tilston*, was adjudicated a bankrupt on the Petition of a creditor, and a creditor's assignee was duly appointed. On the 30th of July, 1866, the day appointed for the first meeting of creditors, the bankrupt made a proposition, which was accepted, that in consideration of all further proceedings in the bankruptcy being suspended, he should take all his estate and effects, and should pay his creditors four shillings in the pound, by two equal instalments at the expiration of three and six months from the confirmation of the proposal.

On the 13th of August, the bankrupt filed a full statement of his accounts; and his proposal was then confirmed by a majority in number, representing three-fourths in value, of the creditors and it was resolved that no further proceedings should be taken in the bankruptcy.

On the 8th of October, the day which was fixed for the bankrupt's final examination, he applied for his discharge under the 110th section of the *Bankruptcy Act*, 1861 (1). The case was

(1) 24 & 25 Vict. c. 134. The 110th section enacts, that "if at such adjourned meeting a majority in number, representing three-fourths in value, of the creditors present, shall so resolve, the proceedings in bankruptcy shall be suspended, and the estate and effects of the bankrupt shall be wound up and administered in such manner as such majority shall direct; and the bankrupt, having made a full discovery of his estate, shall be entitled to apply for an order of discharge."

L. JJ.
1866
Ex parte TILSTON.
In re TILSTON.

adjourned till the 5th of November, when the Commissioner made the following order:—"This Court being of opinion that there is nothing contained in the 110th section of the *Bankruptcy Act*, 1861, to absolve the bankrupt, if he should elect to apply for his discharge, from the necessity of passing his examination in the ordinary course, an opinion confirmed by the decision of Lord *Westbury* in the case of *Ex parte Jones* (1), and that such examination, involving a surrender of all his estate, would be inconsistent with the aforesaid resolution of creditors, by which the assignees became trustees for the bankrupt, who was to take his estate and effects of every description, doth adjourn such examination *sine die*."

From this decision the bankrupt appealed.

Mr. *Bacon*, Q.C., and Mr. *Bardswell*, for the Appellant, contended that the statute only required that the bankrupt should make a full discovery of his estate, which he had done by means of the accounts which he had filed. They referred to *Ex parte Jones*, *In re Carter* (2), and the *Bankruptcy Act*, 1861, sects. 110, 140, 141, and 158.

Mr. *Yate Lee*, for the assignees, said that they were anxious to give effect to the arrangement, which they considered beneficial to the creditors. He referred to *In re Delamere* (3).

SIR G. J. TURNER, L.J.:—

It is difficult to see what the Legislature could have intended by requiring from the bankrupt a full discovery of his estate in cases where the creditors had nothing to do with the estate, as in the present case. They are to take the dividends from the bankrupt, who is to have the property. I do not think the Legislature could have intended that there should be full discovery in all cases, and even if they did so intend, they did not mean that it should be attended with all the conditions of the final examination. The bankrupt is entitled to an order for his discharge, which must be now granted.

(1) 9 L. T. (N. S.) 498; 12 W. R. 221. (2) Law Rep. 1 Ch. 170.
(3) 10 W. R. 547; 6 L. T. (N. S.) 486.

L. JJ.
1866
Ex parte TILSTON.
In re TILSTON.

SIR H. M. CAIRNS, L.J.:—

I am of the same opinion. I think that the words of the section must mean that there should be full discovery in cases where any good would result from it; but not where it would interfere with the arrangement with the creditors. In the present case discovery has been sufficiently made. It need not be made in the form prescribed for the final examination.

Solicitor for all parties: Mr. *W. W. Wynne.*

L. JJ.
1866-7
Dec. 15, 17, 18, 19; *Jan.* 26.

GARDNER *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY (No. 1).

DRAWBRIDGE *v.* SAME.

GARDNER *v.* SAME (No. 2).

IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* SAME.

Railway Company—Debenture Holder—Charge on "the Undertaking"—Surplus Lands—Mortgage to Contractors—Receiver—Manager.

A mortgage debenture made by a railway company in the form given in Schedule C. of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or *interim* rents.

The "undertaking" of a railway company, which is pledged in such a mortgage, is the going concern created by the Act, which cannot be broken up or interfered with by the mortgagee; the "sums of money" are moneys *ejusdem generis* as the tolls, and are the earnings of the undertaking, which may be made available to satisfy the mortgage.

A railway company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works.

The Court will not appoint a manager of a railway.

The decision of *Stuart*, V.C., reversed.

THE first three of the above suits were instituted by holders of debentures, and the fourth by equitable mortgagees on various branches of the *London Chatham and Dover Railway*, and came

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before the Lords Justices by way of appeal from certain orders made by Vice-Chancellor *Stuart*, which will be more particularly referred to.

The history of the railway system, which is now called the *London Chatham and Dover Railway*, is as follows:—

By the *East Kent Railway Act*, 1853, a company was incorporated by the name of the *East Kent Railway Company*, for making a railway from *Strood* to *Canterbury*, with power to raise a capital of £700,000 by shares, and to borrow £233,333 on mortgage.

By the *East Kent Railway* (*Extension to Dover*) *Act*, 1855, the said company was authorized to extend their line from *Canterbury* to *Dover*, with certain branches, and to raise an additional capital of £500,000 by the issue of new shares, and to borrow on mortgage £166,666.

By the *East Kent Railway* (*Western Extension*) *Act*, 1858, the company was empowered to make a railway from their bridge over the river *Medway*, to join the *Mid Kent Railway*, and to be called the *Western Extension*, and the company was empowered to raise £300,000 additional capital by the issue of new shares, and to borrow £100,000 on mortgage, to be charged either on their whole undertaking, or exclusively on the *Western Extension*; and the company was directed to keep separate accounts of all receipts and payments from and on account of the *Western Extension*.

By the *London Chatham and Dover Railway Act*, 1859, the said company was styled the *London Chatham and Dover Railway Company*, and the company was authorized to raise £80,000 by the creation of new shares in the undertaking of the company, and to borrow £26,600 on mortgage of their undertaking, exclusive of the *Western Extension*.

By the *London Chatham and Dover Railway* (*Metropolitan Extensions*) *Act*, 1860, the said company was authorized to make certain new railways, under the name of the *Metropolitan Extensions*, and to raise capital for that purpose by the creation of *Metropolitan Extension* shares, and also to raise £100,000 by other new shares, for the general purposes of that Act; and by the same Act the company was authorized to borrow £550,000 on the security of the *Metropolitan Extension* shares, and £33,000 on the

security of their *General Undertaking*, except the *Western Extension* and *Metropolitan Extensions*.

By the *London Chatham and Dover Railway* (*Capital*) *Act*, 1860, the capital of the company was defined, and the company was empowered to raise by shares the further capital of £300,000, for the purposes of their undertaking, exclusive of the *Western Extension*, and £90,000 additional capital for the purposes of the *Western Extension*, and to borrow £100,000 on mortgage of the undertaking, exclusive of the *Western Extension*, and £30,000 on the *Western Extension*.

By the *London Chatham and Dover Railway* (*Various Powers*) *Act*, 1861, it was enacted, that in construing the Act the expression, "general undertaking," should mean the undertaking of the company as authorized by the *East Kent Railway Act*, 1853, and the *East Kent Railway* (*Extension to Dover*) *Act*, 1855, and if and when the *Western Extension* was merged in that undertaking (which merger shortly afterwards took place), should also include the *Western Extension*. And it was enacted that the *Western Extension* might be united with the *General Undertaking* from such date, and for and in consideration of such perpetual rent-charge, as might be determined by a resolution of the holders of shares and stock; but that such rent-charge should be without prejudice to all previous mortgages, bonds, and debenture stock; and that such rent-charge should be of sufficient amount to pay all interest on all mortgage bonds and debenture stock charged on the *Western Extension*. And the company was authorized to raise £320,000 for the purpose of the *General Undertaking*, and £170,000 for the purposes of the *Western Extension*, or (after the union thereof with the *General Undertaking*) of the *General Undertaking*, by the issue of shares, and to borrow on mortgage £106,000 on the security of the *General Undertaking*, and 56,600 on the security of the *Western Extension*, or after the union thereof with the *General Undertaking*, on the security of the *General Undertaking*.

By the *London Chatham and Dover Railway* (*Additional Powers*) *Act*, 1862, in which it was recited that the *Western Extension* had been united to the *General Undertaking*, the company was empowered to construct additional works, and acquire additional

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land, and to raise by new shares £671,000 for the purpose of the *General Undertaking*, and £1,050,000 for purposes of the *Metropolitan Extensions*, and £750,000 for purposes common to the *General Undertaking* and the *Metropolitan Extensions*, and the company was empowered to borrow £223,600 on mortgage of the *General Undertaking*, and £350,000 on mortgage of the *Metropolitan Extensions*, and £250,000 on mortgage of the common fund.

By the *London Chatham and Dover Railway Act*, 1863, the company was authorized to make the following railways:—1. The *Peckham Line*. 2. The *Greenwich Line*. 3. The *Victoria Bridge Extension*. 4. The *Victoria Station Extension*. 5. A railway forming a junction between the *Brighton Railway* and Railway No. 4. Nos. 1 and 2 were distinguished as *Metropolitan Extensions (Eastern Section)*, and the company was authorized to raise £850,000 by shares for these lines, and £370,000 for Nos. 3, 4, and 5, under the name of *Victoria Station Improvement Shares*. And the company had power to borrow £283,000, by mortgage of the *Metropolitan Extensions (Eastern Section)*, and £123,000 by mortgage on the rent and tolls of the *Victoria Station* and its approaches.

By the *London Chatham and Dover Railway (New Lines) Act*, 1864, the company was authorized to construct certain works called the *Battersea Works*, the *Southern Works*, the *Kent Works*, and the *City Works*; the *Battersea* and *Southern Works* to be part of the *Metropolitan Extensions*, the *Kent Works* part of the *Eastern Section*, and the *City Works*, until made part of some other undertaking, to be part of the *Metropolitan Extensions*; and the company was empowered to raise by new shares £150,000 for the *Battersea Works*, £220,000 for the *Kent Works*, and to borrow an additional sum of £50,000 by mortgage of the *Victoria Station Fund*, and £73,300 by mortgage of the *Eastern Section*.

By the *London Chatham and Dover Railway (City Undertaking) Act*, 1864, the *City Section* of the *Metropolitan Extensions*, and the lands, works, and property, vested in the company for the purpose thereof, were constituted a separate undertaking of the *London Chatham and Dover Railway Company*, to be called the *City Lines Undertaking*, and the company was authorized to raise £1,000,000 by new shares, and to borrow £330,000, by mortgage, and also to

borrow £500,000 additional on the *General Undertaking*, and £533,000 on the *Metropolitan Extensions*.

At an extraordinary general meeting of the company, on the 4th of August, 1865, resolutions were passed enabling the directors, under the powers of the *London Chatham and Dover Railway Act*, 1863, to create capital stock to the amount of £370,000, and, under the *London, Chatham, and Dover Railway* (*New Lines*) *Act*, 1864, to create £150,000 stock; the two sums of stock to be called the *Victoria Station Improvement Stock;* and also to fix the rents and tolls for the station and approaches applicable to this stock, to be called the *Victoria Station Fund;* and also to borrow £123,000 by mortgage on the *Victoria Station Fund*, in respect of the capital stock of £370,000, and £50,000 in respect of the capital stock of £150,000, such mortgages to rank *pari passu*.

Under these various Acts the company proceeded to borrow large sums of money, altogether exceeding £4,000,000, upon mortgage debentures. Among others, the Plaintiff, *Joseph Gardner*, became the holder of a debenture made under the *Various Powers Act*, 1861, which was in the following form :—

"*London Chatham and Dover Railway* (under *Various Powers Act* of 1861).

"Mortgage Deed.

"No. 225. £600. Three Years.

"By virtue of the *London Chatham and Dover Railway* (*Various Powers*) *Act*, 1861, We, the *London Chatham and Dover Railway Company*, in consideration of the sum of £600 paid to us by *Joseph Gardner*, of &c., do assign unto the said *Joseph Gardner*, his executors, administrators, and assigns, the *General Undertaking* of the company, as defined by that Act, and all the tolls and sums of money arising upon, or out of, the said *General Undertaking*, by virtue of the several Acts relating thereto, and all the estate, right, title, and interest, of the company in the same, to hold unto the said *Joseph Gardner*, his executors, administrators, and assigns, until the said sum of £600, together with interest for the same at the rate of £5 for every £100 by the year (subject to deduction in respect of property or income tax) be satisfied, the principal sum to be repaid at the end of three years from the 1st of July,

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1863, and the interest to be payable half-yearly, on the 30th day of June, and the 31st day of December, at the bankers of the company."

The company having failed to pay the principal sum due on this, as well as on others of their debentures, at the time limited for payment, and also the last half-year's interest, the Plaintiff, *Joseph Gardner*, filed his bill (No. 1) on behalf of himself and all other the mortgagees of the *General Undertaking*, as defined by the *Various Powers Act*, 1861, and the tolls and sums of money arising upon or out of the same, against the company, praying that an account might be taken of the sums due from the company to himself and the other mortgagees for principal and interest, and that some person might be appointed to manage the *General Undertaking*, and to receive the tolls and sums of money arising upon or out of the same.

Charles Parker Drawbridge, the Plaintiff in the second suit, was the holder of mortgage debentures upon the security of the undertaking called the *Western Extension*, as authorized by the *Western Extension Act*, 1858; the undertaking called the *Metropolitan Extensions*, as defined by the *Metropolitan Extensions Act*, 1860; the *General Undertaking*, as defined by the *City Undertaking Act*, 1864; and the tolls and sums of money arising from those several undertakings. The debentures were payable in three years from the respective dates, and were in the like form as the debentures under the *Various Powers Act*, 1861, already set forth.

Default having been made in the payment of interest on these debentures, the Plaintiff *Drawbridge* filed his bill in the second of the above suits on behalf of himself and all other the mortgagees of the *Western Extension*, the *Metropolitan Extensions*, and the *General Undertaking*, as defined by the *City Undertaking Act*, against the company, praying similar relief as in the first suit.

The Plaintiff *Gardner* was also a mortgagee of the *Victoria Station Fund*, under the provisions of the *London Chatham and Dover Railway Act*, 1863, and the *New Lines Act*, 1864, and also of the *City Lines Undertaking*, as defined by the *City Undertaking Act*, 1864, and the tolls and sums of money arising in respect

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thereof. The debentures were in the same form, *mutatis mutandis*, as that previously set forth.

The interest on these debentures being also in arrear, *Gardner* filed his bill (No. 2), on behalf of himself and all other mortgagees of the *Victoria Station Fund* and the *City Lines Undertaking*, praying for an account of what was due to him, and for the appointment of some person as a receiver of the *Victoria Station Fund*, and, as a manager of the *City Lines Undertaking*, and to receive the tolls and sums of money in respect thereof, including the rents and sale proceeds of superfluous lands and all other property belonging to the *Victoria Station Fund* and the *City Lines Undertaking*.

The *Imperial Mercantile Credit Association*, the Plaintiffs in the fourth suit, were the assignees of Messrs. *Peto & Co.*, who claimed a debt of £135,000 against the company, as contractors for the construction of some parts of the railway. By a resolution passed on the 21st of February, 1866, the directors of the railway company granted Messrs. *Peto & Co.* a charge upon the surplus lands acquired in respect of the *Metropolitan Extensions*, and the rents and sale proceeds thereof, as a security for their debt. The bill prayed for the appointment of a receiver of the rents and profits of the surplus lands included in the security.

On the 12th of July, 1866, Vice-Chancellor *Stuart* made an order in the first-mentioned suit, *Gardner* v. *London Chatham and Dover Railway* (No. 1), by which *J. S. Forbes*, the general manager, and *W. E. Johnson*, the secretary of the company, were appointed managers and receivers to manage the *General Undertaking* as defined by the *Various Powers Act*, 1861, and the works and property connected therewith, and to receive the tolls and sums of money arising upon or out of the said *General Undertaking*.

On the 17th of July, 1866, the Vice-Chancellor made an order in the second suit, *Drawbridge* v. *London Chatham and Dover Railway Company*, by which the same persons were appointed managers and receivers of the several undertakings of the company, called the *Western Extension*, the *Metropolitan Extensions*, and the *General Undertaking* as defined by the *City Undertaking Act*, 1864, so far as the order of the 12th of July did not extend thereto.

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On the 20th of November, 1866, the Vice-Chancellor made an order in Chambers in the first and second suits directing that all moneys payable to the railway company in respect of sales of their surplus lands should be paid to the receivers appointed by the orders of the 12th and 17th of July, 1866.

In December, 1866, the Plaintiffs in the fourth suit, *Imperial Mercantile Credit Company* v. *London Chatham and Dover Railway*, made an application before the Vice-Chancellor for a receiver of the rents and profits of the surplus lands included in their security, but the application was refused by His Honour.

These four matters were now brought by way of appeal before the Lords Justices. There was also an original motion in the third suit by the Plaintiff *Gardner* for the appointment of a receiver and manager in terms of the prayer of his bill.

Sir *R. Palmer*, Q.C., and Mr. *Kekewick* for the *London Chatham and Dover Railway Company*:—

We complain of the orders of the Vice-Chancellor as being too wide. In the first place, the appointment of a manager of a railway company takes the power and responsibility out of the hands of the directors and vests them in the Court, a state of things which was never contemplated by the Acts under which the company was founded, and might be productive of great inconvenience.

But the most important point now in question is the extent of the security of the Plaintiffs. The orders of the Vice-Chancellor extend over the surplus lands of the company, and the rents and sale proceeds thereof, as well as the rolling stock and other chattels. The mortgages only mention the undertaking, and the tolls and sums of money arising therefrom. This must refer to sums of money of a like nature with the tolls, not all moneys in the hands of the company, which would include the money itself borrowed from the debenture holders. The debentures are in the form given in Schedule C of the *Companies Clauses Act* (1), and are regulated by the 42nd and following sections of that Act, and the question is, what is the meaning of the word "undertaking" in that form? The 2nd section of the same Act enacts that "the expression undertaking, shall mean the undertaking or works of

(1) 8 & 9 Vict. c. 16.

whatever nature, which shall by the special Act be authorized to be executed;" and in the *Lands Clauses Act* (1), the word "undertaking" is used as synonymous with "works." The word must, therefore, refer to the railway which is to be constructed, not to the money which is used in making it. The surplus lands are those which are not wanted for the purposes of the undertaking; and it is therefore a contradiction in terms to say that they form part of the undertaking, or that the money arising from them arises from the undertaking: *Russell* v. *East Anglian Railway Company* (2); *Doe* d. *Myatt* v. *St. Helen's, &c., Railway Company* (3); *Wickham* v. *New Brunswick and Canada Railway Company* (4).

The *Attorney-General* (Sir *John Rolt*), Mr. *Cotton*, Q.C., and Mr. *Simpson*, for the *Imperial Mercantile Credit Association*, the Plaintiffs in the fourth suit:—

So far as the present contention is concerned, we support the same view as the railway company. The object of the Legislature in giving borrowing powers is to get the line completed, and the security of those who advance money is on the completed line, not on the funds by which it is to be completed. This is shewn by the way in which future calls are dealt with. They are not to be included in the security unless expressly so stated in the debenture; and, even if they are included, they cannot be intercepted by the debenture holders if they are required for the purposes of the company, that is for the construction of the railway, unless there is some express stipulation to that effect: *Companies Clauses Act* (5), sect. 43; *Potts* v. *Warwick, &c., Canal Company* (6); *Hart* v. *Eastern Union Railway Company* (7); *McCormick* v. *Parry* (8).

Mr. *Druce*, Q.C., and Mr. *Davey*, for Mr. *Pickersgill*, a submortgagee of the Plaintiffs in the fourth suit.

Mr. *Ferrers*, for Messrs. *Peto & Co.*

Mr. *Dickinson*, Q.C., for the stakeholders of some of the sale-moneys of surplus lands.

(1) 8 & 9 Vict. c. 18.
(2) 3 Mac. & G. 104.
(3) 2 Q. B. 364.
(4) Law Rep. 1 P. C. 64.
(5) 8 & 9 Vict. c. 16.
(6) Kay, 142.
(7) 7 Ex. 246.
(8) 21 L. J. (Ex.) 143.

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Mr. *Bacon*, Q.C., and Mr. *Martineau*, for the Plaintiffs *Gardner* and *Drawbridge*:—

This is not a case for a narrow construction of the terms of the security. The mortgagees understood that the company pledged to them all that it had power to pledge. The *Companies Clauses Act* (1) not only gives power to offer security to lenders, but creates an obligation to pay the money (sect. 50), and consequently the payment of the debenture holders becomes one of the purposes of the company; and all moneys coming to the hands of the company become applicable to their payment. And with respect to the surplus lands, it is especially enacted by the 127th section of the *Lands Clauses Act* (2) that the company shall sell them and apply the sale-moneys to the purposes of the special Act—one of which is certainly the payment of their mortgage debts. The same argument applies to the accumulations of paid-up calls. If the company calls up more money than is expended in the construction of the works, the mortgagees have a right to be paid out of it: *Legg* v. *Mathieson* (3); *Fripp* v. *Chard Railway Company* (4); *Ames* v. *Trustees of Birkenhead Docks* (5); *De Winton* v. *Mayor, &c., of Brecon* (6); *Furness* v. *Caterham Railway Company* (7); *Russell* v. *East Anglian Railway Company* (8).

The form of the mortgage debenture in the schedule to the *Companies Clauses Act*, and the 38th section of that Act, tell in our favour. The special mention of future calls, and the exception in their favour, are a strong indication that every other kind of property was intended to be included in the words "undertaking and sums of money arising by virtue of the said Act." If the accumulations of past calls were not included they would have been specially mentioned as well as the future calls.

We also claim the rolling stock and other chattels of a like nature, as being part of the undertaking of the company.

We do not admit the title of the *Imperial Mercantile Credit Association*. There is no evidence before the Court of any sum being really due to the contractors, upon which the alleged mort-

(1) 8 & 9 Vict. c. 16.
(2) Ibid. c. 18.
(3) 2 Giff. 71. 6 Jur. N.S. 1010
(4) 11 Hare, 241. 17 Jur. 888
(5) 20 Beav. 332. 1 Jur. N.S. 529
(6) 26 Beav. 533. 5 Jur. N.S. 1062.
(7) 27 Beav. 358.
(8) 3 Mac. & G. 125.

gage is based. We also contend that it was beyond the power of the company to give such a charge upon the surplus lands. They had power to sell them, but not to mortgage them. But here there was not even a formal mortgage, nothing but a resolution.

Mr. *Cotton*, in reply, for the Plaintiffs in the fourth suit.

Mr. *Kekewich*, in reply, for the railway company.

Mr. *Bacon*, in reply, upon the original motion in the third suit.

At the conclusion of the arguments,

SIR G. J TURNER said:—

We have had an opportunity of considering the question of the appointment of a manager during the argument of the case. We cannot see that there is any power in the Court to appoint a manager of this railway, and we therefore think that the Vice-Chancellor's order, so far, must be discharged. We will give our reasons when we finally dispose of the case.

As to the other points judgment was reserved.

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Jan. 26. SIR H. M. CAIRNS, L.J.:—

The orders now under appeal, so far as they appointed managers of various undertakings of the *London Chatham and Dover Railway Company*, were discharged by us at the conclusion of the arguments in the case, because we were clearly of opinion that the orders were, in this respect, beyond the authority and at variance with the practice of this Court.

When the Court appoints a manager of a business or undertaking, it in effect assumes the management into its own hands; for the manager is the servant or officer of the Court, and upon any question arising as to the character or details of the management, it is the Court that must direct and decide. The circumstance that in this particular case the persons appointed were

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previously the managers employed by the company is immaterial. When appointed by the Court they are responsible to the Court, and no orders of the company, or of the directors, can interfere with this responsibility. Now, I apprehend that nothing is better settled than that this Court does not assume the management of a business or undertaking except with a view to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends. To the management of the undertakings of the *London Chatham and Dover Railway Company*, assumed by the Vice-Chancellor's orders of the 12th and 17th of July, 1866, no limits, short of repayment of the whole debenture debt, could be assigned, for it has not been and could not be contended that there would, at the hearing of the cause, be any power of selling the undertakings.

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But in addition to the general principle that the Court of Chancery will not in any case assume the permanent management of a business or undertaking, there is that peculiarity in the undertaking of a railway which would, in my opinion, make it improper for the Court of Chancery to assume the management of it at all. When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture holders. It is impossible to suppose that the Court of Chancery can make itself, or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible when it is obvious that there can be

no real and correlative responsibility for the consequences of any imperfect management. It is said that the railway company did not object to the order for a manager. This may well be so. But in the view I take of the case the order would be improper, even if made on the express agreement and request of the company.

I may add that the 53rd and 54th sections of the *Companies Clauses Consolidation Act*, 1845 (1), contemplate, as the remedy of a mortgage debenture holder for his interest and principal, either a suit at law or in equity, to recover the amount, or the appointment of a receiver of "tolls or sums liable to the payment of such principal and interest," a remedy essentially different from the appointment of a manager of the undertaking; and, as regards authorities for the appointment of a manager, while no case has been cited in support of such an appointment, the cases of *Potts* v. *Warwickshire Canal Company* (2), and *De Winton* v. *Mayor, &c., of Brecon* (3), are, so far as they go, authorities against the appointment. These, therefore, are the reasons for which, in my opinion, the orders of the 12th and 17th of July, 1866, in so far as they appointed managers, were erroneous.

The motions which we have now to dispose of are five in number. [His Lordship stated the motions as before mentioned.]

I will postpone for the present any observation as to the fifth motion; and, as to the fourth motion, I may observe that no objection is made to a receiver of the *Victoria Station Fund*, and an order for a receiver of that fund will be made in the usual manner. The main question, however, argued before us on the first four motions was, whether a receiver should be appointed of the rents and of the sale proceeds of surplus lands; or, in other words, whether the mortgage debentures of the Plaintiffs *Gardner* and *Drawbridge* affected those rents and proceeds in such a manner as to entitle them to payment out of that specific fund through the medium of a receiver. In considering this question it is necessary to look, in the first place, at the form of the debentures. [His Lordship read the debentures, which were in the form stated above, and continued:—]

We have next to ascertain the true character of surplus or superfluous land held by a railway company. Surplus land may arise

(1) 8 & 9 Vict. c. 16. (2) 1 Kay, 142. (3) 26 Beav. 533.

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in one of two ways: it may be land originally taken by the railway company in the belief and expectation that it would be required for their line, or for the stations and works connected with it; or (and this is the origin of by far the greater quantity of surplus land), it may be land which the owner, under the provisions of the *Lands Clauses Consolidation Act*, has forced the company to buy, in order that he may not have a severed part of a tenement or field left on his hands. In either case the company is obliged to resell the land within a limited time, applying the proceeds to the purposes of their Act, on pain of the land revesting in the original owner, who, if the land be not in a town, is to have the first option of repurchase. It is obvious from this that the surplus land is, in truth, the representative and equivalent of a certain portion of the capital provided by the company for the execution of their works, which has, not for purposes of profit, but for the protection of landowners, been temporarily diverted and invested in land to be again resold, and which is to return to the capital of the company when the object for which it was diverted has been accomplished. And as regards the *interim* rents, if any, of surplus lands, they would appear to be in the same position as the income arising from capital provided by the company and temporarily invested in any other manner until needed.

The argument by which the debenture holders maintained their right to a receiver of the proceeds of the surplus lands was in substance this: They say they are mortgagees of the undertaking, and of the tolls and sums of money arising out of it, or by virtue of the Act authorizing it; that all the land taken by the company under its Parliamentary powers goes, in the first instance, to form a part of the undertaking; that as soon as any land becomes surplus land it becomes subject at the same time to the Parliamentary provision for its resale, but the sale-moneys are in return subjected to this trust, that they are to be applied for the purposes of the special Act, that is, for the purposes of the undertaking; that these moneys, therefore, become and form a part of the undertaking, and, therefore, of their security, and ought to be preserved and applied for them by this Court. It is necessary to observe carefully to what length this argument must go. A railway is made and maintained by means of its capital, by means of its bor-

rowed money, of its land, of its proceeds of sale of surplus land, of its permanent way, of its rolling stock. All of these may be said, in a sense, to be connected with, to be parts of, to make up, the undertaking. If a mortgage of the undertaking carries *in specie* the sale moneys of surplus lands, it must equally, and on the same principle, carry *in specie* the ordinary land of the company, the capital, the permanent way, the rolling stock—nay, even the very money itself lent on the mortgage. The assignment made by the mortgage debentures is immediate, and is to continue for three years at the least. If the debenture holders are right in their argument, they became immediate assignees *in specie* of all the ingredients which I have enumerated as going to make up the undertaking, and they might, from the first, have asserted their rights as mortgagees by taking and impounding not merely the proceeds of surplus lands, but the capital, the cash balances, the rolling stock, and even their own money advanced. Now it is beyond question that the great object which Parliament has in view, when it grants to a railway company its compulsory and extraordinary powers over private property, is to secure in return to the public the making and maintaining of a great and complete means of public communication; and yet, according to the necessary consequence of the Plaintiffs' argument, the moment the company borrowed money on debentures it would depend on the will or caprice of the debenture holder whether the railway was made at all.

I may further observe, that, in any sense in which the sale-moneys of surplus lands can be considered part of, or moneys arising from, the undertaking, calls made and paid subsequent to the debenture must be equally a part of, or moneys arising from, the undertaking. And yet the 38th section of the *Companies Clauses Act*, 1845, and the form of mortgage in the schedule, clearly assume that under the words of debentures, such as those now before us, future calls would not pass; and the 43rd section provides that, even when future calls are expressly included, the company may (unless the contrary is provided) receive the calls, and apply them to the purposes of the company.

The argument, again, of the debenture holders goes, in fact, to claim for them the same position as if, under the term

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"undertaking," they were mortgagees of the whole property and effects of the company, and, indeed, the prayer in the bill in *Gardner's* suit, No. 2, uses the words, "property belonging to or connected with the undertaking." Now, there is nothing in the *Companies Clauses Consolidation Act*, 1845, to prevent the company borrowing both on bond and mortgage; and the 44th section provides that the bondholders "shall be entitled to be paid out of the tolls or other property or effects of the company," words which, in *Russell* v. *East Anglian Railway Company* (1), were held to mean that the bondholders might obtain a judgment which, under sect. 36, would be executed against the property or effects of the company. But, according to the Plaintiffs' view, the whole of the property and effects of the company, being all parts of the undertaking, would be assigned and mortgaged by the debentures, and thus the right apparently given to the bondholder and judgment creditor would be merely illusory.

It is perhaps unnecessary to pursue further the consequences of the Plaintiffs' argument; but it must be evident that, if that argument be correct, very grave differences of opinion and of interest might arise among the debenture holders. Some might desire to arrest the continuance of the undertaking, and to obtain repayment out of the capital, or other moneys, provided for the works; while others might consider that their most hopeful chance of repayment would be by the expenditure of these moneys so as to earn tolls and profits; and it would be difficult in such a case to see any common interest in the body of debenture holders such as would enable one to maintain a suit on behalf of all.

As regards the effect of the word "undertaking," in these securities, we gain but little information from the definition given in the Acts of Parliament. In the two public Acts, the *Companies Clauses Act* (2) and the *Lands Clauses Act* (3), the "undertaking" is defined to be the "undertaking or works by the special Act authorized to be executed;" and in the private Acts the object appears to be, not so much to describe what is included in the word "undertaking," as to divide by metes and bounds, or otherwise, the various undertakings of the company from each other. The object

(1) 3 Mac. & G. 125.

(2) 8 & 9 Vict. c. 16.

(3) 8 & 9 Vict. c. 18.

and intention of Parliament, however, in the case of each of these various undertakings, was clearly to create a railway which was to be made and maintained, by which tolls and profits were to be earned, which was to be worked and managed by a company, according to certain rules of management, and under a certain responsibility. The whole of this, when in operation, is the work contemplated by the Legislature, and it is to this that, in my opinion, the name of "undertaking" is given. Moneys are provided for, and various ingredients go to make up the undertaking; but the term "undertaking" is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that the "undertaking" is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed.

I ought not to omit to notice a point much pressed by Mr. *Martineau*, in his very clear and useful argument—namely, that, inasmuch as by sect. 127 of the *Lands Clauses Act* (1), the sale-moneys of surplus lands are to be applied to the purposes of the special Act, and as the payment of overdue debentures ought to be taken to be the first duty of a company, therefore the debenture holders

(1) 8 & 9 Vict. c. 18.

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have a right to sustain a suit for this application of the sale-moneys in payment of the debentures. There is no doubt that, if the company were to use these sale-moneys in paying debentures, they would be acting in accordance with their powers; but even admitting that paying debentures is a purpose of the special Act, there are many other purposes, and the directors, and not the debenture holders, must, in my opinion, be the judges to which of several purposes the moneys are to be applied. Whether if a company, after mortgaging the undertaking, were to apply capital or other moneys which ought to go into and improve the undertaking to purposes wholly foreign to the undertaking, they could be controlled by debenture holders, is a question which may at some time have to be considered, but which does not arise in the present case.

The observations which I have made shew that, in my opinion, no distinction should be made between the sale-moneys and the interim rents of surplus land. The order of the 20th of November, directing the sale-moneys of surplus lands to be paid to the receiver, ought, in my opinion, to be discharged. As to the orders of the 12th and 17th of July, and the motion before us, in *Gardner's* suit, No. 2, there ought, in my opinion, to be an order for receivers of the tolls and sums of money arising from the various undertakings mentioned in the two suits of *Gardner*, and in the suit of *Drawbridge*, following the words of the securities. This would ordinarily be sufficient, but, as the question of the sale-moneys of surplus lands has been raised and argued, I think that in each order it should be added: "This order is not to extend to any rents or sale-moneys arising from surplus lands of the company." The costs, both in the Court below and before us, as to these orders, ought, in my opinion, to be costs in the respective causes.

Although I have arrived at the opinion which I have expressed without hesitation, I cannot avoid feeling regret that securities such as railway debentures, upon which so many millions of money have been invested, should have been left at their creation in a state to admit of so much argument as that which has taken place in this case, and that their legal operation and extent should come to be defined, not at the time when they have been given as security, but after difficulties have arisen as to their repayment.

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It only remains to consider the case of the *Imperial Mercantile Credit Association*. This company claims under Messrs. *Peto & Co.*, and are transferees of their rights (whatever they may be) against the proceeds of certain surplus land of the *London Chatham and Dover Railway Company* mentioned in their bill. The allegations are that a sum of £135,000 was due from the *London Chatham and Dover Railway Company* to *Peto & Co.* as contractors for executing works, and that the directors of the railway company gave to *Peto & Co.* a charge for this sum on the sale-moneys arising from these particular surplus lands. *Primâ facie* evidence of the debt is given, and the resolution of the directors admitting the debt and giving the charge are verified, and the company, at the bar, have admitted the claim, desiring, however, not to be taken as acknowledging the specific amount of the debt of *Peto & Co.* It cannot, in my opinion, be doubted but that the company, owing a sum to their contractors for works done, might have paid this sum out of those surplus sale-moneys (the claim of debenture holders being out of the way); and, if so, they might equally, as I think, have given the contractors a charge upon the sale-moneys for the amount. There ought, I think, to be an order in the suit of the *Imperial Mercantile Credit Association* for a receiver of these particular sale-moneys; and as it is desired to save the expense of a receiver's salary, some officer of the company may, perhaps, act without salary, or the purchasers may have liberty to pay their purchase-moneys into Court direct. This order is, of course, merely interlocutory, and subject to reconsideration at the hearing; and if, as was suggested at the bar, the dealings between the company and its contractors should be taken as requiring further investigation, there will, no doubt, be found fitting means of doing this before the cause is disposed of. The costs of this motion also, both before the Vice-Chancellor and here, ought, I think, to be costs in the cause.

SIR G. J. TURNER, L.J.:—

My learned brother has been kind enough to give me the opportunity of seeing and considering his judgment in these cases. I have carefully read, and fully considered it, and I entirely agree both in the conclusions at which he has arrived and in the reasons

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on which they are founded. I adopt, therefore, what has been said by my learned brother, and shall merely add such few further observations as have occurred to me in support of the view which he has taken.

The question we have to determine in these cases depend not upon any rights which the Plaintiffs *Gardner* and *Drawbridge* have or may have merely as creditors of this company, but upon the rights which they have under the debentures on which their claims in these suits are founded, and the nature and extent of these rights must, of course, depend upon the construction and effect of their debentures. I will first consider the debenture on which the first suit of the Plaintiff *Gardner* proceeds.

This debenture first assigns to the Plaintiff *Gardner* the general undertaking of the company, as defined by the *London Chatham and Dover Railway* (*Various Powers*) *Act*, 1861, and this general undertaking is thus defined by this Act: "The undertaking of the company as authorized by the *East Kent Railway Act*, 1853, and the *East Kent Railway* (*Extension to Dover*) *Act*, 1855, and the *Western Extension* if and when merged in that undertaking." This definition must, as it seems to me, be read as inserted into the debenture, and then we must look to the Acts referred to, in order to see what were the undertakings authorized by these Acts. The *East Kent Railway Act*, in sect. 1, after mentioning the railways proposed to be made, speaks of those railways as the proposed undertaking, and by sect. 3 gives power to make the railways with all proper works and conveniences connected therewith; and the *East Kent Railway Company* (*Extension to Dover*) *Act*, 1855, by sect. 1, after mentioning the railways to be made under that Act, recites that the *East Kent Railway Company* are willing to undertake the extension of their authorized line, and by sect. 4 gives power to make and maintain the railway, with all proper stations, works, and conveniences connected therewith, and by sect. 47, enacts that the railway and works by the Act authorized shall be and be deemed to be part of the undertaking of the *East Kent Railway Company*.

Looking to these Acts it cannot, I think, be doubted, that what was intended to be assigned by this part of the debenture was the railways, and the works connected with them, to be made under

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these Acts. It is true that these Acts, either by provisions which they contain, or by those which are contained in the general Acts incorporated in them, give powers to raise money, and to purchase lands, and, in some cases, more land than might be required for the railway, in which cases the Acts provide for the sale of the surplus lands, or for their being restored to the original proprietors; but these powers and provisions cannot, I think, be considered to constitute any part of the undertaking referred to in the debenture. They are no more than the means to the end, and it is to the end, and not to the means by which it is to be accomplished, that this debenture must, I think, be considered to point. The debenture then proceeds to assign to *Gardner* "all the tolls and sums of money arising upon or out of the said undertaking by virtue of the several Acts relating thereto." No doubt could, of course, be suggested as to the meaning of the word "tolls;" but it was insisted, in the course of the argument before us, that all moneys, of whatever character or description, ought to be taken as falling within the description contained in this debenture of sums of money arising upon or out of the undertaking by virtue of the Acts; but it is to be observed that both the Acts referred to by this debenture, and the *Railways Clauses Act*, contain provisions under which sums of money, not measured by the tolls, may be taken by the company, and it would, I think, be a very strained interpretation of the Act to construe the words "sums of money" as extending to moneys derived from sources different from tolls with which those words are so immediately and closely connected. The reasonable construction of these words, taking them with the context, seems to me to be to limit them to sums of money *ejusdem generis* as the tolls. Lastly, the debenture assigns to *Gardner* all the estate, right, title, and interest of the company in the same, But these words are merely referential and cannot alter the construction of what has gone before. They cannot, I think, be construed to extend the operation of the debenture.

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My opinion is, that upon the true construction of this debenture, it proceeds upon the footing of the railway being treated as a continuing and going concern, and that it operates only to charge the railway and the works connected with it, and the tolls and sums of money of the like nature arising from it, in favour of the

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debenture mortgage. Had it been intended to go further, and to charge the capital of the railway company, and the surplus lands, as it was contended before us that it does, there can be no doubt that apt words could have been found for that purpose, and I think that such would have been inserted in the instrument.

It may be asked why the undertaking was assigned by the debenture, if the security was to be limited to the funds of the undertaking only. This question admits, I think, of a very ready answer. The assignment of the undertaking was necessary for the protection of the debenture creditors against other claimants upon the property of the company.

Mr. *Martineau*, in his very able argument, not less able because it was concise, raised a very ingenious point upon the exception of future calls in the form of mortgage given by the *Companies Clauses Act*, which he said indicated that past calls must be considered to have been included in the mortgage; but this argument is, I think, more specious than sound. The Legislature may have considered that the past calls would have been exhausted before the mortgage was made. At all events, I think the argument is too refined to affect the construction of the debenture.

Upon the whole, for the reasons which I have given as well as for those which have been assigned by my learned brother, my opinion is, that the Plaintiff *Gardner* is entitled by this debenture only to a charge on the railway and works connected therewith, and the tolls, and sums of money of the like nature, arising therefrom, and has no claim upon the surplus lands or the moneys which may arise from the sale of them.

What his rights may be as a creditor, independently of the charge created by the debenture, is a question into which I do not enter. The other debentures on which these suits are founded, do not vary in substance from the one on which I have commented, and the observations which I have made apply to these other debentures also. I have nothing to add to what my learned brother has said as to the case of the *Imperial Mercantile Credit Company*.

It may be right that in order to avoid any unnecessary alarm as to the safety of investments which have been made upon railway debentures, I should add that I see no reason to doubt the safety of the security whilst the company by which the debentures

have been issued are carrying on their business to a profit. The debenture holders would have the first charge on the profits.

All parties in the first three suits having agreed to treat the appeal motions as the hearing of the causes, decrees were made in those suits on the basis of the above judgment. The following is an abstract of the minutes:—(Corrected by Reg. Lib. 15 Feb. 1867 A. 379)

GARDNER *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY (No. 1).

All parties consenting to treat the appeal motion as the hearing of the cause, decree as follows:—Declare that Plaintiff is not entitled by virtue of his mortgage securities to any charge upon the rolling stock, &c., chattels and fixtures, in the amended bill mentioned, and dismiss the bill with costs as against the Defendants (trustees of the rolling stock), but these costs to be added to Plaintiff's costs in the cause. Discharge the order of the 12th of July, 1866, so far as it appointed *Forbes* and *Johnson* managers of the *General Undertaking* as defined by the *Various Powers Act*, 1861. Discharge the order of the 20th of November, 1866. Continue *Forbes* and *Johnson* as receivers of the *General Undertaking*, as defined by the *Various Powers Act*, 1861, and of the tolls and sums of money arising thereon; but the order is not to extend to any rents or sale-moneys arising from superfluous lands of the *London Chatham and Dover Railway Company*, or to the rolling stock and other goods and chattels of the company. Account of what is due to Plaintiff on his mortgages. Account of what is due to the other mortgagees who are entitled to rank *pari passu* with the Plaintiff. Inquiry whether there are any other, and what charges, on the *General Undertaking*, and what are their priorities. Inquiry whether the receivers have, out of the tolls and sums of money arising upon the *General Undertaking*, expended any, and what sums otherwise than in payment of principal and interest of mortgage debentures, and under what circumstances; and in the event of any such expenditure appearing to have been made upon the property of the company other than that included in Plaintiff's security, whether any, and what, steps should be taken for recouping to the *General Undertaking*, and the tolls and sums of money included in Plaintiff's security, the sums of money so expended. Tax costs of Plaintiff as between party and party, including costs of appeal motions, &c., to be paid to him out of the sum of £5000 paid into Court by the receivers, but without prejudice to the question how such costs should be ultimately borne, and without prejudice to any application by the Plaintiff to be allowed his costs as between solicitor and client. Reserve F. C. Liberty to apply.

DRAWBRIDGE *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY.

All parties consenting, &c. (as in *Gardner's* suit, No. 1), decree as follows:—Discharge the order of the 17th of October, 1866, so far as it appointed *Forbes*

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and *Johnson* managers of the *Western Extension*, *Metropolitan Extensions*, and *General Undertaking*, as defined by the *City Undertaking Act*, 1864. Discharge order of the 20th of November, 1866. Continue *Forbes* and *Johnson* as receivers of the *Western Extension*, *Metropolitan Extensions*, and the *General Undertaking*, as defined by the *City Undertaking Act*, 1864, and all tolls, &c., so far as the order and decree in *Gardner's* suit (No. 1), appointing a receiver do not extend; but the order not to extend to any rents or sale-moneys arising from superfluous lands of the company, or to the rolling stock and other goods and chattels of the company, the Plaintiff, in the opinion of the Court, not being entitled to such superfluous land, or rolling stock, or other chattels, in virtue of his mortgage debentures. Accounts and inquiries, and taxation of costs, similar to those directed in *Gardner's* suit (No. 1). Reserve F. C. Liberty to apply.

GARDNER *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY (No. 2).

All parties consenting (as in *Gardner's* suit, No. 1) decree as follows:—Declare that Plaintiff is not entitled by virtue of his mortgage securities to the rents or sale-monies of any superfluous lands of the company, and dismiss the bill so far as it relates to Plaintiff's claim to be so entitled. Appoint *Forbes* and *Johnson* receivers of *Victoria Station Fund* and *City Lines Undertaking*, and the tolls, &c., but the order is not to extend to the rents and sale-monies of superfluous lands connected with or belonging to the *Victoria Station Fund* or the *City Lines Undertaking*. Accounts, inquiries, and taxation in costs, similar to those directed in *Gardner's* suit (No. 1). Reserve F. C. Liberty to apply.

Solicitors for the Railway Company: Messrs. *Baxter, Rose, & Norton.*

Solicitors for the Plaintiffs *Gardner* and *Drawbridge:* Messrs. *Walker & Martineau.*

Solicitors for the *Imperial Mercantile Credit Association:* Messrs. *Ashurst, Morris, & Co.*

Solicitors for *Peto & Co.:* Messrs. *Maynard, Son, & Co.*

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Jan. 26, 29, 30.

Interest—Arrears of Income—Executor—Delay.

The Court will not charge an executor who has been guilty of delay in accounting, with interest on arrears of income unpaid by him.

J. was entitled to a life income from the estate of her husband, and died in 1861. A bill was filed by her executor, in 1862, against the executor of her husband's will, who had been his partner in business, for an account of income due to her estate: in 1863 accounts were directed. In 1866 a certificate was made, finding that a large sum was due from the husband's executor:—

Held, that he was not chargeable with interest before the date of the certificate.

Order of the Master of the Rolls affirmed.

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5 Ch 236,

THIS was an appeal from an order made by the Master of the Rolls, disallowing interest on a balance of money arising from income found due from an executor.

John Johnson, an alderman and stone-dealer in *London*, by his will gave all his residuary estate to his brother and partner, *William Johnson*, upon the usual trusts for sale and investment, and on trust to pay the income to *Mary Johnson*, the widow of the testator, during her life. The testator died in October, 1848. He and his brother had been engaged in very large transactions as dealers in stone, and had dissolved partnership, *William Johnson* continuing in business, and retaining the stock. In 1854, the solicitor of *Mary Johnson* made application to *William Johnson* for an account; and in answer *William Johnson* said that he had every reason to believe that the assets were not more than enough to discharge the joint liabilities. After some more correspondence, *Mary Johnson*, in January, 1855, filed a bill against *William Johnson*, but on *William Johnson* agreeing to pay £200 a year, and to furnish proper accounts, that suit was stayed. *William Johnson* paid the £200 a year on account, and the solicitor of *Mary Johnson* made continual application to him for an account, which was never furnished; and in October, 1861, *Mary Johnson* died, having appointed *William Blogg*, the Plaintiff in this suit, her executor. He made many applications for an account, and received answers

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that it was doubtful whether the assets had realized £200 a year; and in September, 1862, the bill in this suit was filed by *William Blogg*, the executor, against *William Johnson* for an account. The Defendant by his answer said that the accounts were very complicated, and that it would be impossible, without employing accountants for many weeks or months, to make out an exact and intelligible account, and that many of the assets had only lately been realized, and he raised questions as to how the income ought to be calculated.

The Master of the Rolls, by a decree made in this suit, on the 5th of November, 1863, directed accounts and inquiries, but difficulties arose in prosecuting them, and on the 16th of January, 1866, an order was made by consent that the accounts should be taken on the principle that *Mary Johnson* was to be considered as entitled to the net rents and profits of the estate until the sale and conversion thereof, and after the sale and conversion, to interest at 4 per cent. on the balance due. On the 3rd of July, 1866, the Chief Clerk made a certificate that the result of the accounts which had been so directed was, that there was due to *Mary Johnson*, at the time of her death, in respect of income, the sum of £4380 16*s.* 1*d.*, as shewn in the accounts filed therewith.

The cause came on for further consideration, when the Master of the Rolls made an order for payment by the Defendant of the £4380 16*s.* 1*d.*, and interest at £4 per cent. from the date of the certificate, and the costs of the suit, but refused to order payment of interest on that sum as from the death of *Mary Johnson* up to the date of the said certificate; the Plaintiff claiming such interest at £5 per cent.

The Plaintiff appealed.

Mr. *Baggallay*, Q.C., and Mr. *Nalder*, for the Appellant.

Mr. *Selwyn*, Q.C., and Mr. *B. B. Rogers*, for the Defendant:—

It is contrary to the rule of the Court to allow interest on arrears of income unless there are special circumstances, and so far from that being the case, they are the other way, for the Defendant has never had this money in his hands, or known how the accounts would turn out. In *Mellish* v. *Mellish* (1), *Anderson* v.

(1) 14 Ves. 516.

Dwyer (1), and *Martyn* v. *Blake* (2), interest on arrears of income was refused, nor does it make any difference whether or not it is a case of trustee and *cestui que trust*. *Taylor* v. *Taylor* (3), *Booth* v. *Coulton* (4), are also authorities. Such a large business could not be immediately wound up: *Rhodes* v. *Rhodes* (5); *Weymouth* v. *Boyer* (6). The delay, if any, was before 1861, and if interest is allowed, the whole account must be opened.

Mr. *Baggallay*, in reply:—

There is no excuse for so much delay: *Lewin* on Trusts (7); *Pearse* v. *Green* (8); *Johnson* v. *Prendergast* (9). The trustee has had the use of this money in his business all the time, and ought to pay interest on it. In the cases cited, the question was, whether interest could be charged on arrears of income as against the reversioner. In *Earl of Mansfield* v. *Ogle* (10), it is clear that if the trustee's conduct had been improper, the decision would have been the other way. In *Booth* v. *Coulton*, *Booth* v. *Leycester* (11) was cited, but not understood. Here we ask for interest on the ground of great delay and very improper conduct.

Jan. 30. LORD CHELMSFORD, L.C.:—

The question which I have to determine is, whether the Master of the Rolls ought to have allowed interest upon a sum of £4380 16*s.* 1*d.* which, by his Chief Clerk's certificate, dated the 3rd of July, 1866, was found to be due to *Mary Johnson*, the widow of the testator, at the time of her death on the 7th of October, 1861, being the amount of arrears of income which she was entitled to for her life under the will of her husband.

[His Lordship then stated the facts of the case as above stated.]

There can be no doubt, if this had been merely an application for interest upon the arrears of income due to *Mary Johnson*, that

(1) 1 Sch. & Lef. 301.
(2) 3 D. & War. 125.
(3) 8 Hare, 120.
(4) 30 L. J. (Ch.) 378; 2 Giff. 514.
(5) Joh. 653.
(6) 1 Ves. 416, 426.
(7) Page 358, 3rd ed.
(8) 1 Jac. & W. 135.
(9) 28 Beav. 480.
(10) 4 De G. & J. 38.
(11) 3 My. & Cr. 459.

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not only the consent order would have been an answer to it, but that without any such order it must have been refused, upon the principle which has been long established by the numerous authorities referred to in the course of the argument. These (as far as I have examined them) were cases where the annuitant, or his representative, claimed interest upon the arrears of the annuity, and they all agree in the conclusion stated in the words adopted by Lord Justice *Turner* in *Earl of Mansfield* v. *Ogle* (1), "The established rule of this Court (which, however, is only general, and not inflexible) is that interest cannot be recovered upon the arrears of an annuity." Perhaps the strongest instance of the rigid application of this rule is to be found in the case of *Aylmer* v. *Aylmer* (2). The only case which was mentioned as opposed to the current of authorities upon this subject is that of *Willcocks* v. *Butcher* (3), in which the Vice-Chancellor of *England* allowed interest to the tenant for life of a trust fund upon the amount found to be due to her for arrears of interest of the fund. But this case has not been followed, and I am not aware that the rule has ever been departed from upon any other occasion.

If, then, the Plaintiff were seeking to obtain interest upon the arrears of income due to his testatrix, the authorities cited would be a conclusive answer to his claim.

But I do not look at the question in that light. The foundation of the Plaintiff's claim is that, by the Chief Clerk's certificate, the Defendant, as executor, must have had in his hands, from the death of *Mary Johnson*, in 1861, a sum of upwards of £4000, which he ought to have paid over to the Plaintiff, but which he retained for five years. This fact brings the case within the range of another principle of equity, that where an executor or trustee unnecessarily retains money in his hand which he ought either to have invested or to have paid over to the person entitled to it, he will be made to pay interest for it. That an executor or trustee so retaining money may render himself liable to be charged with interest, appears from the cases of *Holgate* v. *Haworth* (4); *Stafford* v. *Fiddon* (5); and *Attorney-General* v. *Alford* (6). Where money

(1) 4 De G. & J. 41.
(2) 1 Molloy, 87.
(3) 16 Sim. 366.
(4) 17 Beav. 259.
(5) 23 Beav. 386.
(6) 4 D. M. & G. 843.

is thus improperly retained, it appears to me to be immaterial how the sum has arisen, whether from a legacy, or a distributive share, or a residue, or the arrears of income. In the latter case, the claim for interest is not made on account of the arrears, but for the improper keeping back of a sum of money, from whatever source derived, which the executor or trustee ought to have paid over.

It was objected by the Defendant that even if the Plaintiff might have been entitled to interest it would not be granted to him, because it was not prayed for in the bill, and a dictum of Mr. Justice *Buller*, in *Weymouth* v. *Boyer* (1), to that effect was cited, but this objection was answered by more recent decisions the other way, particularly *Pearse* v. *Green* (2), and *Johnson* v. *Prendergast* (3).

The question then being open, it remains to be seen whether there has been any improper delay on the part of the Defendant in paying over money in his hands belonging to the Plaintiff. The counsel for the Plaintiff contended that in considering this question they had a right to look to the conduct of the Defendant during the life of *Mary Johnson*, and they pressed upon my attention the repeated applications which were made to him on her behalf for accounts which were never rendered.

But if the claim for interest applied to this period, it has been seen that no amount of delay would have entitled *Mary Johnson*, or the Plaintiff as her representative, to have recovered it, and he can derive no benefit from anything which occurred during *Mary Johnson's* lifetime. He can only found his claim upon the improper retention by the Defendant of a sum of money due to the estate of *Mary Johnson;* and the conduct of the Defendant in respect to this debt is alone the subject of consideration.

How, then, does the Plaintiff prove that there has been any unjustifiable delay attributable solely to the Defendant, through which he has had an opportunity of retaining in his hands money belonging to the Plaintiff? It may be admitted that if the accounts had been taken immediately upon the death of *Mary Johnson*, in October, 1861, the Defendant would have been found to be a debtor to her estate in a sum of £4380 16s. 1*d*. But the mere

(1) 1 Ves. 426. (2) 1 Jac. & W. 135.
(3) 28 Beav. 480.

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omission to account will not make a person liable as if he had accounted, and till the account was taken there was no certain sum which the Defendant was bound to pay.

The Plaintiff filed his bill for an account on the 9th of September, 1862. The Defendant's answer was filed on the 15th of January, 1863, and the cause was brought to a hearing on the 5th of November, 1863. The Master of the Rolls then directed certain inquiries and accounts to be made and taken. Upwards of two years afterwards, on the 16th of January, 1866, his Lordship made an order by consent as to the principle upon which the inquiry should be made. To what cause this long delay was attributed has not been explained, but it has not been suggested that the Defendant is answerable for it. The certificate of the Chief Clerk was issued on the 3rd of July, 1866, and then, for the first time, it could be said that the Defendant had any certain sum of the Plaintiff's in his hands, which if retained would render him liable to the payment of interest. Nor was he bound to pay over this sum till the order of the Master of the Rolls on the 20th of November, 1866. I may say, therefore, in the words of Lord Justice *Turner*, in the case of *Earl of Mansfield* v. *Ogle* (1), "There has been nothing to stop payment of the arrears but ordinary legal delay in carrying on the proceedings in the suit, and that is not a sufficient ground for allowing interest."

The Plaintiff's case amounts to this: that the result of the accounting in the suit has been to ascertain that a sum of £4380 16s. 1*d.* was due from the Defendant, as executor, at the death of *Mary Johnson:* that that sum must therefore be treated as if it had been in the Defendant's hands from that time, and so retrospectively to have been improperly retained from that period instead of being paid over to the Plaintiff. I do not see how such a mode of putting the case can be maintained, nor without it how the claim to interest can be established.

The Petition of Appeal must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Fladgate, Clarke, & Finch.*
Solicitors for the Defendant: Messrs. *Cree & Last.*

(1) 4 De G. & J. 421.

WATERS *v.* EARL OF SHAFTESBURY.

L. C.
1866
Dec. 15, 17, 18.
1867
Jan. 11.

Land Drainage Company—12 & 13 *Vict. c.* xci.—*Agent*—*Profit.*

The practice of *The Land Drainage Company* under their Act, of making contracts in which the agent for the landowner contracts to execute the drainage works as agent and surveyor for the company, the landowner finding money for the purpose, and being paid an agreed amount by the company, condemned.

In such a case, notwithstanding the apparent terms of the contract, it may be shewn that the agent was not the real contractor, and is not entitled to any profit on the contract.

Decree of *Stuart*, V.C., varied.

THE Plaintiff in this case had been the steward and land agent of the Earl of *Shaftesbury*, and had filed a bill against the Earl for an account, claiming a considerable balance due to the Plaintiff. The Earl claimed the balance as due to him. A decree was made by the Vice-Chancellor *Stuart* for an account, and in the decree he declared the Plaintiff entitled, as contractor, to a sum of £3827, being the difference between the sum paid by the *General Land Drainage and Improvement Company;* and to be charged on the land, and the sum which was actually expended on certain drainage works. (See 12 Jur. N.S. 311)

The Defendant appealed.

The case is of interest only in its bearing on the practice of the *Land Drainage Company;* and the facts material to this point appear in that part of his Lordship's judgment which is given below.

Sir *Roundell Palmer*, Q.C., and Mr. *Snape*, for the Earl of *Shaftesbury*.

The *Attorney-General* (Sir *John Rolt*), Mr. *Jessel*, Q.C., Mr. *Roupell*, and Mr. *Chester*, for the Plaintiff.

Jan. 11. LORD CHELMSFORD, L.C.:— 1867

The appeal in this case is confined to that part of the decree which declares the mode in which the account to which the Plaintiff is decreed to be entitled is to be taken.

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The question raised by it is, whether the Plaintiff ought to be credited with the sums paid by the *Land Drainage Company* in respect of certain contracts entered into with them, and debited with all sums of money and materials received or taken by, or supplied to him by, or at the expense of, the Defendant, and also with all interest charged against and paid by the Defendant in respect of moneys advanced by him, or on his credit, and applied to the execution of the works. In other words, whether the Plaintiff is entitled, as a contractor, to the profits arising out of the contracts, consisting (as stated in the argument for the Plaintiff) of the difference between the sums advanced by the *Land Drainage Company* and the amount actually expended upon the drainage works.

It will conduce to a clearer view of the question to consider, in the first place, the course of proceeding when a landowner, who is tenant for life of an estate, wishes to raise money for drainage improvements, and to make it a charge upon the inheritance. This is done under the Act 12 & 13 Vict. c. xci., "An Act for the Incorporation of the *General Land Drainage and Improvement Company*, and for facilitating the Execution of Land Drainage and other Improvements." By the 42nd section, the landowner is to enter into a provisional contract with the *Land Drainage Company* for the improvement of the land, and for the execution by the company of such works as may be thought proper for such improvement. The provisional contract being entered into, the landowner, by the 43rd section, is to apply to the Inclosure Commissioners to sanction the proposed improvements, stating certain particulars as to the manner of effecting the improvements, the estimated expense, and the estimated increase in the value of the land which will be produced by the proposed improvements. If the Inclosure Commissioners entertain the application, they are, by sect. 45, to cause the land, and the plans, estimate, and specification of the proposed improvements, to be inspected and examined by an assistant Commissioner, or an engineer, who is to report his opinion thereon. If the Commissioners are thus satisfied that the proposed improvements will effect a durable improvement in the yearly value of the lands proposed to be improved, which will exceed the yearly amount proposed to be

charged by sect. 46, they are to sanction the proposed improvements, and after such sanction the provisional contract between the landowner and the *Land Drainage Company* becomes an absolute contract.

Soon after the passing of the Act the *Land Drainage Company* issued a prospectus stating the arrangements which they were prepared to enter into with landowners for effecting the improvements under the Act, according to different classes, of which two only need be noticed, the first and the third, which are in the following terms:—

Under Class 1 a landowner may undertake the entire execution of improvements by his own agent, and employ his own funds for the purpose, the company engaging to repay him the amount expended after the works have been approved and passed by the Inclosure Commissioners, and the charge on the estate completed.

In this case the landowner will be solely under the control of the Inclosure Commissioners.

Under Class 3 a landowner may commit the whole responsibility of the improvement to the company, who will undertake the preparation of plans and specifications, and the execution of the works with an efficient staff in constant practice, or by sub-contractors, under the immediate superintendence of their own surveyor, the company supplying the money required for the purpose, and ultimately charging the estate with the outlay and expenses.

The terms of the company under each of these classes is stated in the prospectus as follows:—

Class 1. For all works executed on loans under this class, a commission of $5\frac{1}{2}$ per cent. is charged on the amount paid to the landowner.

Class 3. Where the company undertake, and are responsible for, the entire improvement, the commission on drainage is 7*s.* 6*d.* per acre, and the surveyor's charge is 4*s.* per acre, including travelling expenses.

The mode of effecting the improvements proposed to landowners under Class 1 in this prospectus does not appear to me to be in

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conformity with the intentions of the Legislature. The *Land Drainage Act* contemplates the performance of the works by the company; for the only contract into which the landowner is empowered to enter by the 42nd section is for the execution by the company of such works as may be thought proper for such improvement. If the company are permitted to delegate to the landowner the power to execute the improvements without any other control than that of the Inclosure Commissioners, who, according to the evidence, merely cause two inspections to be made, one to ascertain the probable cost, and the other (when the works are completed) the actual cost of the improvements, it is obvious that a wide door will be opened to abuse. The company appear to have a correct idea of the office they are to undertake in carrying out the proposed improvements by their practice in cases falling under Class 1. This, as described by the secretary to the company, is to have two deeds, one between the landowner and the company, and the other between the landowner and his agent, and under such second deed the agent is constituted the surveyor of the company for the purpose of executing the works for the sum named in such contract.

The object of this course of proceeding is apparent. It is to leave to the landowner the whole control over the execution of the improvements, whilst upon the face of the contracts they will appear to be executed by the company, thus adhering to the letter while they are violating the spirit of the Act. I do not mean to say that works performed in this manner cannot lawfully be made a charge upon the land, or that whether they can or not will be material in the present case, but it is evident that the Plaintiff's claim has arisen entirely out of this questionable practice of the company, which they will do well to reconsider.

Two contracts were entered into for the drainage of the lands of the Defendant under Class 1, and each of these was carried into effect by two deeds, according to the practice already explained. The first of them was made between the *Land Drainage Company* and the Defendant, by which the company covenanted to execute the improvements specified in the schedules, at the expense of £15,600, which was to be charged on the land by way of annuity, after the rate of £6 0*s.* 4*d.* per centum per annum, for the period

of thirty-one years. The other deed was made between the *Land Drainage Company* of the first part, the Defendant of the second part, and the Plaintiff of the third part, and recited that the Defendant was desirous that the company should employ the Plaintiff as their surveyor and agent for the execution of the improvements, and that the company were willing to employ him, and that he was willing to act as such surveyor and agent on the terms thereinafter appearing. And then the company covenanted with the Defendant, and also separately with the Plaintiff, and the Defendant covenanted with the company, and also separately with the Plaintiff: 1. That the Plaintiff should, so long as he duly performed and observed the articles, be the surveyor and agent of the company for the purposes of the improvements. 2nd and 3rd. That the Plaintiff would, before the 1st of March, 1860, execute the improvements specified in the second schedule of the other deed, for the sums amounting to £14,786, and that the company would pay those sums to the Defendant after the execution of the improvements. 4. That the Defendant would pay to the Plaintiff all the expenses which he should incur in or about the execution of the improvements, or otherwise under the deed, and that, on the improvements being executed, the accounts between the company and the Defendant, and between the company and the Plaintiff, should be settled, and credit given to the company for the payments made to the Plaintiff, whether in respect of the whole, or only for a part of the works actually executed, and that those amounts respectively, and also the accounts between the Defendant and the Plaintiff: should be settled on the footing of such respective credits being given. The two deeds executed under the second contract were exactly similar.

The works proceeded, and during their progress money was paid from time to time by the company, amounting, as the Plaintiff alleges, to upwards of £21,000. The sums expended upon the improvements are stated by him to amount to £17,181, and by his bill filed in this suit he claimed the sum of £3827, being the difference between the sum paid by the *Drainage Company* for the improvements and the actual amount expended upon their execution, as the profit to which he was entitled as contractor named in the deeds.

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The Vice-Chancellor was of opinion that the Plaintiff was the real, and not merely the nominal, contractor for the execution of the works under these contracts, that he had a right to a contractor's profits upon them, and having directed an account of the dealings and transactions between the parties (to which the Plaintiff is clearly entitled), he proceeded to order that in taking such account the Plaintiff should be credited with the sums paid by the *Land Drainage Company*, and debited with all sums of money and all materials received or taken by him under the contracts. From this part of the decree (as already mentioned) the appeal is brought.

Upon the argument before me, the Attorney-General contended that the whole case resolved itself into the mere construction of a deed; that the contract between the parties was in plain and explicit terms; and that it did not lie in the mouth of the Defendant to contradict it. This argument cannot, in my opinion, be successfully maintained. It is contrary to the principle upon which equity proceeds, in a variety of cases, of ascertaining the truth of a transaction which is hid under the form of a written instrument. I will merely, by way of illustration, mention the case of a purchase by one person with the money of another, where the consideration money is expressed in the deed to be paid by the person in whose name the conveyance is taken.

It is also contended, on the part of the Plaintiff, that the services which he performed in respect of the drainage contracts were not within the range of his duties as the Defendant's land agent and steward.

His Lordship then commented on the evidence, and the facts of the case, and came to the conclusion that the Plaintiff was not entitled to the sum he claimed, either as profit or as remuneration. His Lordship had nothing to do with the doubts expressed, whether the expenditure was not much larger than the amount alleged by the Plaintiff, nor with the question as to the propriety of allowing the Defendant to take the profits of the contract to himself, and to make them a charge upon the estate, or how the profits were to be dealt with. All his Lordship had to consider was whether the Plaintiff ought to have an account in respect of the drainage contracts in question, and his Lordship was of opinion

that the Plaintiff had wholly failed to establish his right to be treated as a contractor, and that the Vice-Chancellor's decree, so far as it was appealed from, must be varied.

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Solicitors for the Appellant: Messrs. *Baxter, Rose, & Norton.*
Solicitor for the Plaintiff: Mr. *A. Hemsley.*

STEELE *v.* NORTH METROPOLITAN RAILWAY COMPANY.

L. C. 1867 *Feb.* 8.

Jurisdiction—Restraint of Application to Parliament—Company.

A railway company agreed to purchase the land of a landowner, and had a clause to that effect inserted in their Act; whereupon he withdrew his opposition to the Act. They afterwards applied to Parliament for an Act to enable them to abandon the branch which affected the land in question, and to repeal that clause:—

Held, that the Court would not restrain the company from making the application.

The Court has power to restrain an application to Parliament, but it is difficult to conceive a case in which it will be done.

Decree of *Wood*, V.C., affirmed.

IN the year 1866, a bill was introduced into Parliament for the construction of a railway, to be called the *North Metropolitan Railway*, with several branches, one of which, called No. 5, would prejudicially affect certain lands at *Cricklewood*, belonging to the Plaintiff, Mr. *A. R. Steele*, and he opposed the bill in Parliament. The Plaintiff and the railway company, however, came to an agreement that the Plaintiff should withdraw his opposition to the bill, and that the company should pay him certain sums for costs, and that two clauses should be inserted in the bill to the effect that the company, if required so to do by the Plaintiff, at any time within three years after the passing of the Act, would purchase certain parts of the property of the Plaintiff at *Cricklewood*, for £35,000, which sum should include all compensation for damage to him; and that the Plaintiff, instead of requiring the company to purchase the property, should be at liberty to require the company to pay him full compensation for all damage.

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The bill passed into an Act, with the two clauses, but the company had not proceeded with the railway, and had served notice on the Plaintiff of their intention to apply in the present session for an Act to enable the *North Metropolitan Railway Company* to abandon the construction of the Branches Nos. 5 and 6, and to repeal the above-mentioned clauses in the former Act, and the company had presented a Petition to Parliament accordingly.

The Plaintiff now filed a bill against the company, stating as above-mentioned, and alleging that he had entered into certain family and business arrangements on the faith of the agreement and clauses above-mentioned, and praying that the company might be restrained from proceeding with their Petition and bill, so far as they sought to repeal the clause in question.

The Plaintiff moved, before the Vice-Chancellor *Wood*, for an injunction, according to the prayer of the bill, and the Vice-Chancellor refused the motion (1).

(1) Vice-Chancellor *Wood*, Jan. 24, 1867.—His Honour thought this was a case in which it was impossible for the Court to interfere. That the Court had jurisdiction to prevent an application from being made to Parliament in any case where the rights were simply private between the parties, there could be no doubt. It was formerly maintained that it was impossible to prevent an individual from applying to Parliament, because that would be an interference with the privileges of the High Court of Parliament itself. That argument, however, was answered at once, by Lord *Cottenham* saying that the Court of Chancery did not interfere with the Court of Parliament, but only acted on the conscience of the individual who proposed to make the application. In the case of private bills, in which, with one remarkable exception, the public could have no interest, it might well be conceived that where a tenant for life had stipulated that he would not apply for a private Act, he might be restrained from so doing. But in the case of public bills, the jurisdiction would remain as before; but the difficulty was to conceive a case in which it would be applied. As to this particular case, there could be no doubt whatever. In the first place, there was nothing in the shape of an express contract not to apply to Parliament again. If a man had made an agreement to buy a house or field, and afterwards found the agreement inconvenient, and wished to apply to Parliament to set it aside, that possibly might be a case in which the Court would interfere, and say that this, not being a matter of public policy, the man should not make such an application. But this was the case of a company who were about to carry into effect a public purpose, and the Legislature had authorized them to make several branch railways; and, in order to induce Parliament to sanction this, the promoters were obliged to shew what money would be wanted, and that they had enough.

The Plaintiff appealed.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Nalder*, for the Plaintiff:—

This is a gross breach of faith by the company. Mr. *Steele* gave consideration for this agreement by abandoning his opposition, and allowing the company to obtain what they wanted—a status, on which they now come to Parliament. Either party to any suit might as well apply to Parliament to be relieved from his engagements. The Court will interfere in such a case: *Hawkes* v. *Eastern Counties Railway Company* (1). The Plaintiff has made his arrangements, and cannot be replaced in his former position: *Ware* v. *Grand Junction Water Works Company* (2); *Heathcote* v. *North Staffordshire Railway Company* (3); *Lancaster and Carlisle Railway Company* v. *North Western Railway Company* (4); *Attorney-General* v. *Manchester and Leeds Railway Company* (5). If the company have to pay the money they will have the land. It has been argued that the employment of this money in buying our land will prevent the company from performing some public duty, but are they to do this at our expense; there is nothing in our agreement with which the public is concerned. The reason why there is no precedent for such an application as this, is, that such conduct is very rare.

Mr. *W. M. James*, Q.C., and Mr. *Fooks*, for the Defendants, were not called upon.

In this case this must have been done, and then, by agreement, this clause as to the Plaintiff's land was inserted. They had entered into no agreement not to apply to Parliament, and now intended to apply for power to abandon the line. As decided in *Hawkes* v. *Eastern Counties Railway*, that alone would not release them from their obligation to the Plaintiff, and therefore they intended to apply to Parliament to do so; and they might well say to Parliament, we wish to have this £35,000 to apply to public purposes, and it was for Parliament to say what compensation, if any, was to be made to the Plaintiff. No doubt it was very unsatisfactory for persons in the Plaintiff's situation to have their property left in such uncertainty, but many of Her Majesty's subjects were exposed to similar inconvenience, and the Court could not interfere on that account, but must leave that question to Parliament.

(1) 1 D. M. & G. 737.
(2) 2 Russ. & My. 470.
(3) 2 Mac. & G. 100.
(4) 2 K. & J. 293.
(5) 1 Railw. Cas. 436.

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LORD CHELMSFORD, L.C., after stating the facts, continued:—

Now I must assume that, unless it is for the public benefit, Parliament will not authorize the substitution of other works instead of those railways, Nos. 5 and 6. But if, under the consideration of the public benefit, which always comes into the idea of Parliament upon these questions, it should be found necessary, or for the public advantage, that other works should be substituted for Nos. 5 and 6, then the Plaintiff's property will not be required. In what situation then will the company be? They cannot retain it; they do not want it for the purpose of any of their railways; and they must dispose of it, giving the Plaintiff, Mr. *Steele*, the right of pre-emption. If he does not choose to exercise his option, then they may sell it to any person who will become the purchaser. The Plaintiff comes to the Court, under these circumstances, to restrain the company from endeavouring to repeal these clauses.

Now there is no doubt (as has been said by many Judges), that you may interfere to prevent a person applying to Parliament, because you are not interfering with the functions of Parliament, but you are acting on the person, and restraining him from taking a step which the Court says ought not to be taken. But no case has been produced to me in which the Court has ever prevented an application to Parliament for an Act; and, in some of the cases which have been cited in the course of the argument, it has been stated, that there is some difficulty in conceiving a case in which such a course could be adopted. Lord *Cottenham*, in the case of *Heathcote* v. *North Staffordshire Railway Company* (1), said: "The injunction cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of it to do so. What difference then can it make whether such pre-existing rights exist by the tenure of property or by virtue of contracts? In both cases Parliament has the same power of destroying, altering, or affecting, such pre-existing rights, providing, as it always does, or intends to do, compensation to the party affected, and in neither has this Court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which

(1) 2 Mac. & G. 110.

he finds himself bound, whether arising from contracts or otherwise."

The case of the *Manchester and Leeds Railway Company* (1), would be a very strong case on this subject if the Petition for the bill had not been presented to the House and the bill entertained. But the observations of Lord *Cottenham* certainly shew the difficulty he felt in interfering in a case of this kind; and I confess it appears to me that the Lord Chancellor entertaining the opinion, and expressing that opinion in the strongest terms, that the attempt to procure the passing of the clause was a direct breach of the undertaking, one would rather have expected that instead of saying, "That is a matter which I do not go into," he would have said, "I should have had no doubt whatever that I ought to interfere in this case, if it were not that a Petition has been presented, and that the bill has been entertained by Parliament." It only shews the extreme difficulty which Judges have had in dealing with the question, and in supposing any case in which it was possible that a party could be restrained from making such an application to Parliament.

Take again the opinion of Vice-Chancellor *Wood* in the case of the *Lancaster and Carlisle Railway Company* (2). His Honour says:—"To apply these principles to the case before me; suppose an agreement by a public company, containing an express stipulation, not confined to any particular portion of the agreement, but extending to the whole of it, binding the company never to apply to Parliament to relieve them in any way from the agreement they have made. In the absence of such an express stipulation as I have supposed; the company would be perfectly free to apply to Parliament to abrogate any agreement they had made, notwithstanding it was made in the most solemn manner, and bound them by every conceivable stipulation, except that one stipulation, which I suppose absent, to treat it as final. If the company had grounds of public policy to submit for the purpose of inducing Parliament to abrogate the agreement they would be at liberty to submit them." Then His Honour goes on:—"I am supposing the agreement to contain an express stipulation that the company will not submit those grounds of public policy to

(1) 1 Railw. Cas. 436.

(2) 2 K. & J. 308, 309.

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Parliament." Even in that case, His Honour—considering the two results, one of which would follow, namely, the passing or rejecting of the bill—still seemed to think there was nothing whatever which would justify him in such a case in interfering to prevent an application to Parliament.

In this case the contract contains no stipulation at all that the company should not apply to Parliament, and yet the Plaintiff must have known that it was likely that the branches Nos. 5 and 6, which interfere with his property, might not be constructed; and it is possible that the three years were introduced into the contract with reference to that contingency. However that may be, I think that, in the absence of such a stipulation in the contract, this is a case in which the Court ought not to interfere.

I think, moreover, that the case is not wholly bare of considerations of public benefit. The question as to the substitution of other works for lines Nos. 5 and 6 is a question which must be considered by Parliament, with a view to the public advantage. If Parliament thinks that the new works will be more beneficial to the public than the lines Nos. 5 and 6, then what is the consequence? The Plaintiff's house and land are a dead weight upon the company, and must embarrass them in a considerable degree in carrying out the operations which will be sanctioned by Parliament. If the Plaintiff has suffered, or will suffer, by the existence of the contract, or by the rescission of it by Parliament, I think we may rely upon the wisdom and justice of Parliament not to repeal this clause without giving the Plaintiff ample compensation, and providing for that compensation by some clause in the bill.

With respect to the observations which have been made as to the inconvenience and the damage which Mr. *Steele* will sustain either by the existence of the contract, or by its now being rescinded, one must look a little to the terms of the agreement. He did not contemplate the absolute sale of his property to the company; he was at liberty, if he thought fit, in lieu and instead of requiring the company to purchase his property, to require them to pay him full compensation for all damage. Therefore it is a case in which, even upon the agreement itself, when Parliament shall come to deal with it, they may provide or award to the Plaintiff

such compensation by the bill as he himself contemplated under certain circumstances he might prefer receiving, to parting with his property.

We have been told by Judges of great eminence that the Court has power to interfere by injunction to prevent an application to Parliament; but they all decline to define the occasion which would justify such an interference, and even express an opinion as to the difficulty of conceiving a case in which any one could be so restrained. Although, in common with my predecessors, I assert the right to grant an injunction in a proper case, like them I will not attempt to define my power, but will simply say that this is not a case in which I think I ought to interfere. Under these circumstances this motion will be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Steele & Sons.*

Solicitors for the Defendants: Messrs. *Wilson, Bristows, & Carpmael.*

PHILLIPS *v.* HUDSON.

Bill of Peace—Commoners—Crown Survey and Grant—Evidence—Costs of Appeal.

A bill will lie against the lord by one copyholder, on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such a bill.

Where a manor formerly belonged to the Crown, a grant and survey recorded in the Augmentation Office is not evidence for the tenants against the lord.

Where a decree is made by the Court of Appeal, reversing the decree of the Court below, and dismissing the bill with costs, the costs of the appeal will usually be given.

Decree of the Master of the Rolls reversed.

THE bill in this case was filed by *George Phillips*, and stated that he had been admitted, as heir of his father, to all the lands and hereditaments held of the manor of *Tooting Beck*, in the county of *Surrey*, except one small tenement. That *Tooting Common* formed a portion of the said manor, and the whole of the profits

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coming or arising from the common (with the exception of a portion of the woods thereupon which belonged to the lords of the manor) had by immemorial custom always belonged to the tenants of the manor, and were now vested in the Plaintiff and the owner of the other small tenement. That the Defendants, *T. Hudson*, *H. Willis*, and *W. Borradaile*, were the lords of the manor. That the Defendants had recently begun to assert rights over the common, and in particular to cut, remove, and dispose of the turf and loam on the common, and threatened to remove and dispose of the remaining turf and loam thereupon, and the Plaintiff prayed that it might be declared that he and the owners of the aforesaid small tenement as the only tenants of the manor were entitled to the whole of the profits coming or arising from or out of the common (subject to the rights, if any, of one *John William Brown* therein), and to the aforesaid rights of the other Defendants, or otherwise that the rights of the Plaintiff in the said common might be ascertained and declared, and that the Defendants might be restrained from cutting, removing, or disposing of the turf and loam on the said common, or otherwise interfering with the rights of the Plaintiff over the said common.

The Defendants, by their answer, alleged that their predecessors had from time immemorial, and that they themselves intended to, cut, remove, and dispose of such part of the turf and trees as they should think expedient.

Evidence was entered into on both sides, and the Plaintiff produced a certified copy from a record in the Augmentation Office of a survey and grant made in the reign of King *Edward* VI., when the manor belonged to the Crown, in which it was stated that the value of the ground and soil was nothing, for that the tenants always used to take the whole of the profits thereof coming or arising, except certain of the woods.

The cause came to a hearing before the Master of the Rolls, who, on the 23rd May, 1866, made a decree directing the following inquiries:—1. What persons are entitled to any and what rights of common over the common of *Tooting Beck?* 2. Whether the Plaintiffs are entitled to any and what parts of the soil of the said common? 3. An inquiry what persons are now exercising any and

what rights over the said common? and the said persons were to be at liberty to come in under the decree (1).

The Defendants appealed.

Mr. *Selwyn*, Q.C., and Mr. *Kekewich*, for the Appellants:—

This is not a bill on behalf of others, but by one of the two only copyholders. It is admitted that there is no authority for such a bill, but if such a bill would lie, the records of the Court would contain many such, for in nearly every common the rights of the lord and commoners are uncertain. How are the costs to be borne? If such bills are entertained, the Court will have to frame a complete code of rules about them and about the manner of raising the costs. Besides, on the evidence the Plaintiffs have failed completely. *Primâ facie*, the common belongs to the lord, and the commoners must produce evidence to displace his right, but the evidence is the other way.

Mr. *Jessel*, Q.C., and Mr. *Bury*, for the Plaintiff:—

This bill is in the nature of a bill of peace, and an individual commoner can maintain such a bill to prevent his being disturbed, *Spence*, Eq. Jur. (2), where several cases in the Registrars' books are mentioned: *Mayor of York* v. *Pilkington* (3); *Lord Sefton* v. *Lord Salisbury* (4); *Arthington* v. *Fawkes* (5); *Mitf.* Pl. (6). We shew that at the date of the grant all the soil and the profits belonged to the tenants, and there is nothing to shew that it has ever been taken away. We shew *primâ facie* evidence, and if they rely on any release or presumed release by us, they should have pleaded it, and we could then have met their case. If the Defendants say that the bill ought to have been filed on behalf of all the other copyholders, and that is held to be so, the bill can stand over to be amended by adding parties.

(1) The MASTER OF THE ROLLS:— I think in this case I may properly make a decree. It is of a singular description, but I think there is authority sufficient for it. His Lordship afterwards said: I think I shall be doing good; that is a strong consideration with me.

(2) Vol. i. p. 656, 657.

(3) 1 Atk. 282.

(4) 7 W. R. 272.

(5) 2 Vern. 356.

(6) 5th ed. p. 169.

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Mr. *Selwyn*, in reply:—

All the cases cited in *Spence* were by consent or else for other objects. In *Arthington* v. *Fawkes* (1), the lord sued all the tenants.

LORD CHELMSFORD, L.C.:—

Notwithstanding the arguments on the part of the Plaintiff, I still entertain an opinion which, from the very opening of the case, I certainly felt very strongly, that this decree cannot be supported.

It has been said that the Master of the Rolls had no difficulty whatever in making the decree appealed from; but I think the words of his Lordship are very far from expressing a confident opinion that he was right in the conclusion at which he had arrived, and he seems to have been considerably influenced by the circumstance that he might in this way be doing good (as he expresses it) by enabling the rights of the parties, with respect to a sum of money which had been paid by way of compensation for some land taken by a railway company, to be ascertained.

Now, nobody ever disputed, what all the authorities from a very early period state, that a bill may be filed by an individual to determine the customs of a manor. But, then, all previous bills were filed by the Plaintiff on behalf of himself and the other persons whose rights are involved, and the question here is whether this is what is technically called a bill of peace of that description.

Can this bill, then, in any sense, be considered to be a bill filed by the Plaintiff in respect not only of his own rights, but of the rights of other persons, and those persons so numerous that the Court, according to the exercise of its jurisdiction in cases of this description, would interfere to prevent a multiplicity of suits? It is perfectly clear that the only claim which is set up in respect of these profits of common, or rights of common, is the right of the Plaintiff himself, and the owners of a small tenement, who do not interfere, and no objection can possibly arise to their not being made parties, because it is not a bill of that description which requires that they should be parties to the suit.

Then, besides common of pasture, the Plaintiff claims all the profits of the common, with the exception of the woods, and, as

(1) 2 Vern. 356.

evidence, has produced a document from the Augmentation Office; but I have very great doubt whether it is evidence at all for the Plaintiff in this case, because, what is it? It is a survey which comes from the Augmentation Office of the possessions of the Crown—a survey made for the purposes of the Crown, and just the same as if it had been a survey made by a private owner, in which a statement is made that the ground and soil of the common, containing in the whole 140 acres, is valued at nothing, for that the tenants of the manor have always used to take the whole profit thereof coming or arising. Now, suppose a private person, who is lord of a manor, had for his own purposes a survey made in which such a statement was contained, and that the tenants of the manor were to get hold of that survey, and endeavour to use it against the lord; can it be said that they would be allowed to do so, and that they could get what is really a private memorandum (it is only public because it is Crown land, and the analogy is the same), and make it available for these purposes against the title of the lord?

However, assuming that these documents are evidence, and evidence for the tenants, they amount merely to this, that in the time of *Edward* VI. the whole of the profits of the common belonged to the tenants, with the exception of the woods. But, as has been very properly asked, what were the profits at that time? It does not say that the tenants are entitled to the soil (that is most important), or that they are entitled to take the whole of the profits coming or arising from the soil; and the question here is, whether the lords are entitled to interfere with the rights of the tenants (whatever they may be) by digging turf and loam; that is, taking a portion of the soil? Upon that subject the evidence is perfectly conclusive, because, giving all the effect which the Plaintiff requires to these documents which come from the Augmentation Office, still the evidence on the part of the Defendants shews most distinctly that, with regard to the taking of the soil itself (which is really the question), that right has been exercised for a period of nearly fifty years without interruption and without dispute. For this period the lords and ladies of the manor have taken the turf and the soil, and have sold it for their own advantage. Therefore, supposing that the Plaintiff had a right to file such a bill, to have

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the rights which he claims in the profits of the common established, and to restrain the lords from infringing on his rights, his case entirely breaks down upon the proof, for he establishes no right whatever, except a right of common of pasture. He does not shew that the lords have interfered with that right in any illegal manner; that is, that they have been doing any act which they had not a lawful right to do; and, therefore, supposing even that he had a right to file this bill, still the case entirely fails upon the proof.

Then what does the Plaintiff's case really amount to? He says: "I have certain rights of common, which have been interfered with by the illegal acts of the lord; I come to the Court to have those rights declared." But the answer is: "If this is a disturbance of your common, why do you not bring your action? You may maintain an action; prove your right of common, prove that the lords have invaded that right, and you will recover at law. You can only maintain your individual right to come here by connecting some other persons, and saying that this bill is, in fact, not merely a bill to establish your right, and to have the lords restrained on your behalf, but that you are claiming a right in which a number of other persons are interested, and therefore, according to the ordinary mode in which the Court will exercise jurisdiction to prevent multiplicity of suits, you ask the Court to interfere in your favour, and in favour of those other persons who are interested with you." Under these circumstances, with very great respect for the Master of the Rolls, who appears, as I have already said, to have entertained very great doubt whether he ought to make a decree in this case, I cannot conceive how in a case of this kind there can possibly be the decree which is prayed for.

It is said that this is clearly a bill to establish the doubtful rights of commoners. If that is so, I can hardly understand the observation of the Master of the Rolls, that the case is of a "singular description," because everybody knows it is common, I will not say very frequent, to have a bill of that kind either by the lord against his tenants, or by the tenants against the lord; but it is certainly a bill of very singular description in the view I have taken, which, if correct, may account for this expression on the part of the Master of the Rolls. Therefore I feel that I am not doing any very great

violence when I express an opinion that the Master of the Rolls ought not to have directed the inquiries contained in his decree. He has, in fact, directed a very large inquiry, and even more than the Plaintiff asked for, by inviting all persons to come in, and by ordering advertisements to be issued that they might know there was this question to be litigated. It would be very hard indeed upon the lord to have these questions determined at his expense. Under all the circumstances, therefore, I feel little difficulty in coming to the conclusion that the decree of the Master of the Rolls must be reversed, and the bill be dismissed with costs, including the costs below and the costs of this appeal.

Mr. *Jessel* mentioned that the rule had always been, subject to any modification, not to give costs of the appeal at all when the judgment below was reversed, and such costs had only been given in very recent cases.

The LORD CHANCELLOR:—

But where there is no foundation whatever for the bill, and when I am of opinion that the bill ought to have been dismissed with costs at the former hearing, it ought to be dismissed with costs upon the appeal. The question is, who has occasioned all the expense?

Solicitors for the Plaintiff: Messrs. *Holmer, Robinson, & Stoneham.*

Solicitors for the Defendants: Messrs. *Freshfields & Newman.*

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Jan. 22, 23;
Feb. 7.

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Partnership—Dissolution—Accounts—Profits.

By the agreement between two partners, each was to have interest at 5 per cent. on his share of the capital, and the profits were then to be equally divided between them.

A decree was made for a dissolution and a sale of the partnership property; but the business was carried on for some time afterwards until the property was finally sold:—

Held, that after the dissolution, interest was no longer payable under the agreement; and that in the division of the proceeds of the sale each partner would take what was found to be his share of capital at the time of the dissolution, with the accumulations thereof, and that the residue must be equally divided between them.

Decree of the Master of the Rolls varied.

3 Ch. 786
5 Ch. 523
8 Ch. 2, 3, 5,
9 Ch. 203.
13 Ch D 842-3,
844.

THE Plaintiff and the Defendant in this case had carried on for about nineteen years the business of millers and mealmen in partnership, under articles of agreement made in the year 1840, by which it was agreed that the capital of the partnership should be £100,000—£75,000 to be provided by the Plaintiff, and £25,000 by the Defendant. Half-yearly accounts were to be taken, and out of the net gains and profits of the trade, the partners were, in the first place, to be paid interest at £5 per cent. upon their respective shares in the capital, and, after deducting that interest, the gains and profits were to be divided into shares, the Plaintiff taking three-fourths, and the Defendant one-fourth. By a subsequent agreement, the gains and profits, after deducting the interest, were to be equally divided between the partners.

In the year 1859, the Plaintiff filed a bill for a dissolution of partnership, and for the usual accounts. On 22nd of June, 1861, a decree was made that the partnership should be dissolved, and the partnership stock and effects sold, and the proceeds paid into Court.

The business was, however, carried on until a sale could be effected, all the proceeds being paid into Court; and on the 12th of August, 1862, everything was sold and disposed of, and the proceeds were also paid into Court.

Several accounts were taken, and certificates given, varied, and discharged, and, by consent, part of the sum in Court was paid out, leaving £39,730 consols in Court; and, finally, the Master of the Rolls made an order declaring that interest ought not to be allowed on the amounts of the capital of the partners on 20th of June, 1861, when the decree for dissolution was made; and directed an inquiry how much of the money derived from the sale of the partnership property was attributable to capital, and how much to profits; also an inquiry how much of the sum in Court was attributable to capital, and how much to profits; and declared the Plaintiff and Defendant were respectively entitled to so much of the sum in Court as consisted of interest and accumulations thereof derived from the investment of so much of the purchase-money as should be ascertained to be attributable to capital, in the same proportions in which they were entitled to capital on 20th of June, 1861, and he adjourned the further consideration.

The Plaintiff, to whom it appeared nearly the whole of the capital belonged at the date of the decree for dissolution, the Defendant never having brought in his specified share of the capital, appealed from this order.

Sir *Roundell Palmer*, Q.C., and Mr. *Wickens*, for the Plaintiff, contended that interest at £5 per cent., according to the articles of partnership, ought to be allowed from the date of the dissolution until the property was finally disposed of. The business was necessarily carried on until it was disposed of, and on what terms could it be carried on except those of the agreement between the partners: *Collyer* on Partnership (1). *Smith* v. *Donaldson*, before the House of Lords (not reported), was cited.

Mr. *Selwyn*, Q.C., and Mr. *W. W. Cooper*, for the Defendant, admitted that there was a great absence of authority as to what ought to be done in such a case, but contended that the order of the Master of the Rolls was right, and was in accordance with a previous decision of the Lords Justices on a former appeal upon another question in this case. The contract to pay interest was determined when the partnership was dissolved: *Rhodes* v. *Rhodes* (2);

(1) Page 230.

(2) Joh. 653. 6 Jur. N.S. 600

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and none is payable unless there is a contract: *Stevens* v. *Cook* (1). How are the profits which arose from the surplus assets, and not from the trading, to be divided? No doubt the trade was carried on, but not under the articles of partnership, and merely to wind up the concern, until it could be sold.

Sir *R. Palmer*, in reply:—

Interest, though not payable by common law, is payable by the custom of merchants: *Ex parte Chippendale* (2); and besides, the agreement ought to govern as long as the trade is carried on: *Crawshay* v. *Collins* (3).

Feb. 7. LORD CHELMSFORD, L.C., after stating the facts of the case, continued:—

The question is, whether the account for the period between 20th of June, 1861, and 12th of August, 1862, ought to be taken in the same manner as an account would have been taken under the articles of partnership, by deducting out of the profits of the trade, interest at £5 per cent. upon the respective capitals of the Plaintiff and Defendant before the division of such profits between them.

Upon this question, it appears to me that the Master of the Rolls (whether he was acting in deference to the supposed opinion of the Lords Justices or not) came to a right conclusion.

The decree for the dissolution of the partnership put an end to the joint trade between the parties. From the date of that decree it is incorrect to say that the partnership was continuing, although the trade was, in a certain sense, being carried on; that is, for the purpose of realizing the property and effects, and winding up the partnership concern. No doubt profits might have resulted, and apparently did result, from the sale of the partnership stock and property, but they cannot be regarded as the "gains and profits of the joint trade" in the terms of the articles of partnership.

What, then, were the respective rights of the parties as to the

(1) 5 Jur. (N. S.) 1415. (2) 4 D. M. & G. 19.
(3) 2 Russ. 325.

proceeds of the sale upon the dissolution of the partnership? Each partner was entitled to the return of his capital, and if the sale had taken place the day after the decree, the appropriation of the proceeds would have been simple enough. After restoring their capital to each of the partners, the surplus must have been equally divided, because no other principle of division would have been applicable. But the sale was not effected all at once, and the moneys which were not applied in payment of debts, or were not paid out to the Plaintiff and Defendant respectively, were invested and accumulated from time to time by the addition of dividends. The proper mode of dealing with this fund is the matter to be decided.

The partnership articles being out of the question, no agreement exists for allowing £5 per cent., or any interest, upon the capital of the partners. Indeed, as I have already shewn, there are no profits of the trade, in the proper meaning of those words, from which interest could be deducted. But the money which remains in the bank represents the remainder of the capital of the parties respectively, after the payments which have been made to them out of the fund on this account, and the accumulations which have arisen from dividends upon the sums invested. I think that each of the partners having the residue of his capital paid out of this fund must also be entitled to the accumulations which have been produced by the capital of each respectively; and these amounts being ascertained, the surplus of the fund (if any) will be divisible equally between the partners.

I do not see any necessity for any further inquiry than merely to ascertain how much of the sum of £39,739 Bank Annuities is required to pay up the capitals of the Plaintiff and Defendant respectively, and how much of it is the result of accumulations from dividends; then a declaration that the Plaintiff and Defendant are entitled to so much of the Bank Annuities as consists of interest and accumulation from the investments of the purchase-money as shall have arisen from the respective capitals; and if, after fully paying the capitals of the partners respectively, and apportioning the accumulations to the capitals producing them, there should be any surplus of the £39,739 Bank Annuities, it is to be divided between the Plaintiff and Defendant equally.

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MINUTES.—Declare that interest ought not to be allowed upon the amounts of capital of the partners on the 20th of June, 1861.

Inquire how much of the Bank Annuities remaining to the credit of the cause of *Watney* v. *Wells* is required to pay up the capitals of the Plaintiff and Defendant respectively, and how much of the said Bank Annuities and cash on the credit of the same cause is the result of accumulations from dividends upon so much of the said Bank Annuities as will represent the capitals of the Plaintiff and Defendant respectively; and the residue (if any) which will remain of the said Bank Annuities and cash, after appropriating the said capital and accumulations, is to be certified and divided into moieties.

Affirm the declaration of the Master of the Rolls, that the Plaintiff and Defendant are entitled respectively to so much of the said Bank Annuities as consists of interest and accumulations from the investment of their respective capitals.

Declare that if, after fully paying the capital of the parties respectively, and apportioning the accumulations to the capital producing them, there shall be any surplus of the said Bank Annuities and cash, such surplus is to be divided between the Plaintiff and Defendant equally.

Solicitors for the Plaintiff: Messrs. *McLeod, Stenning, & Watney.*
Solicitors for the Defendant: Messrs. *Godwin & Pickett.*

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1866
Dec. 10, 11, 12, 13;
1867
Jan. 26.

Penalty—Agreement to accept Part of Debt in discharge of the Whole—Proviso reviving original Debt—Trust to raise Money by Mortgage.

An agreement was entered into between debtor and creditor that the amount due should be taken at £72,000, that the debtor should pay £21,000 on a certain day, and give by a certain day a first mortgage on a certain estate for £30,000, and that, if he did so, the payment and mortgage should be taken in satisfaction of the whole claim; but if he failed in doing so, the creditor was to be at liberty to recover the whole £72,000. This agreement was shortly afterwards modified, making the payment in cash £33,000, and the mortgage £18,000; the mortgage-money to be payable by two yearly instalments, and the agreement was expressed to be "without prejudice to the right" of the creditor to recover the whole debt in case the principal and interest to be secured by the mortgage were not duly paid on the respective days appointed in the mortgage deed for payment thereof. The £33,000 was paid, and a mortgage duly given for the £18,000, containing a proviso that the debtor should not dispute the right of the creditor to recover the whole sum, except on payment of the mortgage-money, "on or before, but not after," the days appointed for payment thereof:—

Held, by the Lord Chancellor (affirming the order of the Master of the Rolls), that, although a creditor may effectually agree with his debtor to accept a mortgage for less than the whole demand in satisfaction of the whole, with a proviso that if the money is not paid to the day he shall be remitted to his whole demand; yet, in the present case, under the agreement, the payment of the £33,000, and the giving the mortgage, were all that was necessary to bar the right of the creditor to recover the larger amount, and that the stipulation in the mortgage deed entitling him to do so, if the mortgage-money was not paid to the day, was in the nature of a penalty, against which the Court would relieve, such proviso not being any part of the original agreement: *dissentiente* the Lord Justice *Turner*, who was of opinion that the transaction was one in which the creditor agreed to accept a smaller sum, if paid to the day, in satisfaction of a larger subsisting demand, and that the doctrine of penalties did not apply.

Property on which *A.* had a mortgage was conveyed to trustees in trust to raise £75,000, to pay off the incumbrances prior to *A.* *A.* paid off and took transfers of the incumbrances, paying £75,000 in all for principal and interest. The trustees then by a deed to which the mortgagor was a party, assigned the £75,000 raisable under the trust deed to *A.*, with all interest to become payable on it, and conveyed the property to *A.*, subject to redemption on payment of £75,000 and interest:—

Held, that this was not a mortgage under the trusts, and that, as against incumbrancers prior to this last deed, *A.* could only stand as a transferee of

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the incumbrances which he had paid off, though as against the mortgagor and incumbrancers subsequent to the last-mentioned deed, *A.* was entitled to the whole £75,000 and interest.

Revd by H of L. 4 H.L. 1

THIS was an appeal by the Plaintiffs from an order of the Master of the Rolls (1). The facts of the case were as follows:— In 1853 the Defendant *Hudson* was seised in fee of the *Newby Park* estate and the *Whitby* estate. Both estates were subject to incumbrances, and in October, 1853, *Hudson* agreed to sell the *Newby Park* estate to Lord *Downe* for £190,000. In December, 1853, an order was made in a suit in which the *York and North Midland Railway Company* were Plaintiffs, by which it was declared that *Hudson* was bound to pay to the company £54,590, and it was ordered that he should pay into Court £20,000, part of this sum, on the 1st day of Hilary Term then next, and the residue on or before the 1st day of Easter Term then next. This order was duly registered as a judgment, and notice of it given to Lord *Downe*. Two other suits were then pending, which had been instituted by the *York and North Midland Railway Company* against *Hudson*, in which decrees for accounts had been made. In one of these suits £4104, and in the other £14,831 was claimed.

On the 30th of January, 1854, an agreement was made between the railway company and *Hudson*, by which, after reciting the decree for the payment of £54,590, and the institution of the other suits, and that the company claimed £4104 and £14,831 in those suits, "which said several sums the Defendant admits the Plaintiffs are entitled to recover under the several decrees, but his liability to which several sums the Defendant would by appeal against the said several decrees, or some of them, have disputed if the arrangement herein contained had not been entered into," *Hudson*, "in consideration of the said several sums so decreed or claimed in the said respective suits being due to the Plaintiffs, and the said Plaintiffs forbearing to require immediate payment of the said sum of £20,000, and also consenting upon certain conditions hereinafter specified, to accept the sum of £50,000 in discharge of the said respective sums due to them in the said suits, and also the sum of £1000 in discharge of costs," agreed that he and his trustees

(1) Law Rep. 2 Eq. 612.

should within fourteen days "execute a good and valid mortgage to the Plaintiffs or to trustees to be nominated by them and on their behalf of the real and personal estate which he has lately contracted to sell to Lord Viscount *Downe* for £190,000 for securing to the Plaintiffs the sums of £50,000 and £1000 with interest." Secondly, that on the 6th of April then next, being the time for the completion of Lord *Downe's* purchase, Lord *Downe* should pay to the Plaintiffs out of the purchase-money £20,000 in part of their claim, and £1000 for costs, and that *Hudson* and all other necessary parties should execute to the Plaintiffs a good and valid mortgage of the *Whitby* estate for securing to them the repayment of £30,000 less certain deductions which reduced the sum to £25,613, "the payment of which sum is to be made by three equal annual instalments, commencing from the 6th day of April next." The fourth clause provided that "the entering into this agreement and the acceptance by the said Plaintiffs of its provisions shall in no way prejudice the Plaintiffs' existing lien on the estates of the Defendant, nor the different proceedings in the said suits, nor their right to continue the same until the total amount agreed to be accepted from the Defendant shall be wholly discharged." Then *Hudson* agreed to consent to final decrees in the suits for the £4104 and the £14,831, and not to take any proceedings to avoid or reverse such decrees, or the decree already made in the other suit "other than by payment of the sums hereinbefore agreed upon, and which shall be considered and taken to be a satisfaction of the whole amount of such claims." The agreement contained this proviso: "In consideration of the said several agreements on the part of the said Defendant, the Plaintiffs, by their solicitors, undertake and agree that on the Defendant securing the said sums of £20,000, £1000, and £25,613, with such interest as aforesaid in manner aforesaid, they, the Plaintiffs, will accept the same in full discharge of the said several sums decreed or claimed to be due to them in the said suits for principal money, interest, and costs, and will, at the expense of the Defendant, release their lien upon the estate purchased by the said Lord Viscount *Downe* as aforesaid, and at the expense of the said Defendant execute a proper release and discharge of their claims upon the said Defendant; but in case the said Lord Viscount *Downe* or the Defendant shall not pay and

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secure the said sums to the Plaintiffs in manner aforesaid, or if a good and satisfactory mortgage shall not be executed to the Plaintiffs for the said sum of £25,613 and interest, or if the said Defendant shall fail in performing all or any of the stipulations on his part hereinbefore contained, then the Plaintiffs shall be at full liberty to recover the said principal sums, interest, and costs decreed or claimed to be due to them in the said several suits, and to adopt all such proceedings, in the said several suits or otherwise, for aiding the recovery of their said claims as they may be advised."

By a deed of the 16th of February, 1854, purporting to be made in pursuance of the above agreement, the *Newby Park* estate sold to Viscount *Downe*, and his purchase-moneys, were mortgaged by *Hudson* to *Thompson* and *Seymour* as trustees of the railway company for securing the £51,000. This deed contained a proviso for redemption on payment of the £51,000 on the 6th of April, 1854 (the time fixed for the completion of Lord *Downe's* purchase), and this further proviso: "Provided always that these presents shall not, nor shall anything herein contained, in any manner prejudice, affect, or interfere with the rights and claims of the said railway company under or by virtue of the said several hereinbefore recited decrees or orders, or any or either of them, against the said *George Hudson*, his heirs, executors, administrators, or assigns, or in any manner prejudice, affect, or interfere with, or avoid the lien, charge, or claim, if any such there legally or equitably be, of the said railway company under or by virtue of such decrees or orders, or any or either of them, against or upon the hereditaments, moneys, and premises respectively comprised in, and conveyed and assigned by, these presents, or any part or parts of such hereditaments, moneys, and premises, or against or upon any other real or personal estate which now or at any time hereafter may belong to or devolve upon the said *George Hudson*, his heirs, executors, administrators, or assigns, it being the express understanding and intention of all parties to these presents that the security hereby given shall be in addition to and not in any manner in substitution for the lien or charge which the said *York and North Midland Railway Company* now have upon the said hereditaments, moneys, and premises comprised in these presents under or by virtue of such decrees, or

orders, or any or either of them, or anything therein respectively contained."

Before anything further was done under the agreement of the 30th of January, 1854, it was found that it could not be carried into effect, the surplus of Lord *Downe's* purchase-money being insufficient to discharge the incumbrances upon the estate sold to him and upon the *Whitby* estate, so as to enable, a first mortgage of the latter estate to be made to the Plaintiffs, according to the agreement; and in August, 1854, an agreement was come to between the company and *Hudson*, which was fully recited in one of the deeds of the 20th of October, 1854, mentioned below. This recital stated that *Hudson* had applied to the company to vary the terms of the agreement of the 30th of January last, in order to enable him to discharge out of Lord *Downe's* purchase-money the claims of the several persons (other than the railway company) having charges, liens, or claims upon the *Newby Park* and *Whitby* estates, and that the company upon such application consented that the terms of the agreement of the 30th of January, 1854, should, "but nevertheless without prejudice to the right of the said company to recover the whole of the moneys ordered to be paid to them by the said final decree in the said secondly hereinbefore mentioned suit, and the whole of the moneys which the said company are entitled to recover in the said firstly and thirdly hereinbefore mentioned suits, and the consent to final decrees therein contained in the said hereinbefore recited agreement of the 30th of January last, in case the principal sum and interest hereinafter mentioned to be secured by an indenture hereinafter recited, or any part or parts thereof are not duly paid on the respective days in the last mentioned indenture applied for payment thereof,—be varied in the following particulars:"

The varied agreement provided that Lord *Downe*, instead of paying the £21,000, should pay £33,000, and that a mortgage should be made to the railway company of the *Whitby* estate and other property of Mr. *Hudson*, subject to the prior charge of £75,000 thereinafter mentioned; and it was provided that the *Whitby* estate and other property of *Hudson's* should be vested in trustees to be nominated by him, to raise £75,000, be applied along with the residue of Lord *Downe's* purchase-money in paying off incumbrances

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on the premises to be included in the mortgage, and also certain other debts charged upon *Hudson's* property, and "that on the lastly hereinbefore mentioned mortgage being given by the said *George Hudson* to the said railway company, and on the before-mentioned charges, incumbrances, debts, judgments, and liens being paid off, discharged, and satisfied by the said *George Hudson*, the railway company should at his expense execute to him a proper release and discharge of their liens and charges upon his real estate and the leasehold premises thereinbefore mentioned, and should, on full payment of the balance of principal moneys, and interest at the times appointed for payment thereof, at the request and costs of *Hudson*, execute to him a proper release and discharge of their claims upon him."

In pursuance of this varied agreement, several deeds were executed. By one of these deeds, dated the 20th of October, 1854, and made between *Hudson* of the first part, the railway company of the second part, and *Philipson* and *Wright* (*Hudson's* trustees) of the third part, the *Whitby* estate and other estates, part of the property of *Hudson*, were conveyed and assigned by *Hudson* and the railway company to *Philipson* and *Wright* upon trust to raise by mortgage the £75,000 mentioned in the varied agreement. This deed recited both the original and varied agreement, and also recited that the company had consented to concur in it with the intent of enabling the £75,000 to be raised, but without prejudice in any other respect to all their rights and remedies by virtue of the agreements, and it was expressed that the company joined in the conveyance only for the purpose of enabling the £75,000 to be raised. Trusts were declared of the £75,000 for payment of incumbrances, but it was declared that nothing in the deed should give to any person for payment of whose debt provision was thereby made any lien on the premises further or otherwise than if the deed had not been made.

By another of these deeds, also dated the 20th of October, 1854, and made between *Hudson* of the first part, *Philipson* and *Wright* of the second part, the railway company of the third part, and *James Walker* of the fourth part, a part of the *Whitby* estate was conveyed to *Walker* upon trust to sell, and to lay out the moneys arising from the sale in improvement of the premises to be mort-

gaged to the company, or in part satisfaction of their mortgage; and this conveyance was expressed to be made on the part of the company, to the intent that the premises might be discharged of all liens, claims, and demands of the company under the said decrees, or orders, or otherwise, but without prejudice to any lien, claim, or demand which the company might then or at any time thereafter have upon or against any other estates or effects of the Defendant, *George Hudson*, under or by virtue of the said decrees, or orders, or otherwise.

By another of these deeds, dated the 21st of October, 1854, and made between *Thompson* and *Seymour* of the first part, the railway company of the second part, *Philipson* and *Wright* of the third part, *Hudson* of the fourth part, and Lord *Downe* of the fifth part, the *Newby Park* estate was conveyed to Lord *Downe*, *Thompson* and *Seymour* receiving out of the purchase-money £33,000 therein mentioned to have been paid as to £953 for interest due to the company upon the security of the 16th of February, 1854, and £32,047 in part discharge of the moneys due to the company for principal and interest upon the same security, and upon the orders, decrees, and proceedings in the indenture of the 16th of February, 1854, mentioned or referred to. *Thompson* and *Seymour* and the company joined in conveying to Lord *Downe* freed and discharged from all their claims, but subject to a proviso expressing in great detail that this conveyance should not prejudice any lien, right, claim, or demand of the company or their trustees upon any other property of *Hudson*, nor prejudice the right of the company to take any proceedings in the suits, or any of them, for recovery of any moneys due or claimed therein, except as against the property comprised in this conveyance.

By another of these deeds, dated the 21st of October, 1854, made between *Hudson* of the first part, *Philipson* and *Wright* of the second part, and *Thompson* and *Seymour* of the third part, reciting the payment of the £33,000, and that the sum of £953 had been applied in payment of the interest of the moneys secured by the deed of the 16th of February, 1854, and that the residue thereof, amounting to the sum of £32,047, had been received by the company in part payment of the principal, leaving £14,566, the balance of the principal money,—*Hudson* and *Philipson* and *Wright*

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conveyed to *Thompson* and *Seymour* the *Whitby* estate (subject to the trusts of the deed for raising £75,000, and to certain other incumbrances which were among those to be paid out of the £75,000), and assigned and demised to *Thompson* and *Seymour* certain other property of *Hudson's*, subject to a proviso for redemption on the payment by *Hudson* of the £14,566, as to one moiety on the 21st of October, 1855, and as to the other moiety on the 21st of October, 1856, according to the varied agreement. *Hudson* covenanted for payment of the £14,566 in manner aforesaid, and that if any part thereof should remain unpaid contrary to the covenant he would pay interest thereon. This deed also contained a proviso in these terms: "Provided always, and it is hereby agreed and declared that these presents shall not, nor shall anything herein, or in the said hereinbefore recited agreement of the 30th day of January last, or the said recited mortgage security made and executed in pursuance thereof, or in the said hereinbefore recited subsequent arrangements and agreements contained, prejudice or affect the rights and claims of the said *North Eastern Railway Company* under the hereinbefore recited decrees or orders respectively made in the three several hereinbefore mentioned suits, or under any or either of such decrees or orders,—or the rights and remedies of the said *North Eastern Railway Company* against the said *George Hudson*, his heirs, executors, administrators, or assigns, under or by virtue of such decrees or orders, or any or either of them,—or the rights of the said *North Eastern Railway Company* under or by virtue of the said recited agreement of the 30th day of January last, or otherwise, to call upon the said *George Hudson* to consent to or otherwise obtain a final decree in each of the said suits hereinbefore firstly and thirdly mentioned for the several sums of moneys in the said recited agreement of the 30th day of January last mentioned in that behalf, or any other sum or sums of money which may be recoverable in the said last mentioned suits or either of them, or to recover the whole of such several sums of money, and the sums of money, interest, and costs, which by the hereinbefore recited final decree made in the said secondly hereinbefore mentioned suit were declared to or ordered to be paid to the said *York and North Midland Railway Company*,—or prejudice or interfere with any lien or charge which the said *North Eastern Railway Company* shall or

may have upon or against the hereditaments or premises hereinbefore respectively expressed to be granted, appointed, demised, or assigned, or upon any other real or personal estate which now or at any time hereafter may belong to the said *George Hudson*, his heirs, executors, administrators, or assigns, or in which he or they may have any beneficial interest; it being the express understanding of all parties to these presents that the security intended to be hereby given shall be in addition to, and not in any manner in substitution for, the charge or lien which the said *North Eastern Railway Company* may have upon the said hereditaments or premises comprised in these presents under or by virtue of the said decrees or orders or any or either of them, and that the said *George Hudson*, his heirs, executors, administrators, or assigns, shall not be at liberty to dispute the right of the said *North Eastern Railway Company* to recover the whole of the principal moneys, interest, and cost which by the said final decree in the said secondly hereinbefore mentioned suit are awarded to the said *York and North Midland Railway Company*, and the whole of the several principal moneys, interests, and costs mentioned in the said agreement of the 30th day of January last to be recoverable in the said first and thirdly hereinbefore mentioned suits, except on or until full payment by the said *George Hudson*, his executors, administrators, and assigns, on or before but not after the several days hereinbefore appointed for the payment thereof, of the principal sum and interest hereby secured."

By a subsequent deed of the 11th of December, 1854, indorsed on the last mentioned deed, *Hudson* charged the premises with a further sum of £570.

No part of the principal secured by the last mentioned mortgage deeds having been paid, and several incumbrances intended to be provided for out of the £75,000 remaining undischarged, the company paid off and took transfers of these incumbrances. The company thus paid, in respect of principal and interest, more than £75,000, the amount of principal, however, being considerably less than £75,000.

By a deed of 20th of October, 1857, made between *Philipson* and *Wright* of the first part, *Hudson* of the second part, and *Thompson* and *Seymour* of the third part, reciting among other

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things that no part of the £75,000 had been raised under the trusts, and reciting payments by *Thompson* and *Seymour* to the incumbrancers to the amount of £75,000, and that the payment by the company's trustees to one of the incumbrancers had been made upon an arrangement and agreement between the parties to the present deed, that the premises vested in *Philipson* and *Wright* under the deed of the 20th of October, 1854, and the £75,000 thereby directed to be raised, should be respectively conveyed and assigned to *Thompson* and *Seymour*, to secure to them the repayment of the £75,000 paid by them as aforesaid; and that the security should be in addition, and auxiliary to, and not in any manner in substitution for, the several securities which *Thompson* and *Seymour* then held—*Philipson* and *Wright*, with the consent of *Hudson*, transferred to *Thompson* and *Seymour* the £75,000 directed to be raised by the deed of the 20th of October, 1854, and all interest to accrue due thereon; and *Philipson*, *Wright*, and *Hudson*, conveyed and assigned all the property comprised in that deed to *Thompson* and *Seymour*, subject to a proviso for redemption on payment of £75,000 and interest, at the expiration of six calendar months; and the deed contained a further declaration, that the present deed should be in addition to all other securities which the company or their trustees held.

The bill was filed in January, 1863, by the railway company and *Thompson* and *Seymour*, their trustees, against *Hudson*, and various incumbrancers on his estates. By the decree an account was directed of what was due to the several incumbrancers in respect of their incumbrances. By an order, dated the 11th of July, 1866, the Master of the Rolls declared his opinion to be that the accounts ought to be taken on the footing that the Plaintiffs were bound to accept the £14,566, and £570 secured by the deeds of the 21st of October and the 11th of December, 1854, with interest thereon according to those deeds, in full satisfaction of all their claims. His Lordship further held that the accounts ought, as against those mortgagees who were subsequent to the Plaintiffs, to be taken on the footing that the Plaintiffs were not entitled to any charge under the indenture of the 20th of October, 1857, or to charge against the mortgaged properties any sums except the sums respectively due on the several mortgages and in-

cumbrances transferred to them. His Lordship ordered the accounts to be taken accordingly, and directed that the amounts due on the several mortgages to which the Plaintiffs were entitled should be certified separately, without prejudice to any question.

The Plaintiffs moved to discharge or vary this order.

Sir *Roundell Palmer*, Q.C., Mr. *Selwyn*, Q.C., and Mr. *Williamson*, for the Plaintiffs:—

The contract ought to be carried into effect according to its terms. *Ford* v. *Earl of Chesterfield* (1) is precisely in point. In that case there might have been some ground to assimilate it to one of specific performance, where time is not in equity of the essence of the contract. Here it is expressly made so; in fact, it may rather be said that time was the whole consideration for the contract. The agreement here was acted on as much as in that case, though the Master of the Rolls proceeds on the contrary view. The case cannot be assimilated to that of a mortgage for £10,000, with a covenant to pay £20,000 if the £10,000 is not paid to the day. Where a covenant to pay a larger sum is entered into as incidental to securing a smaller one, the doctrine of penalty applies; but it has no application where there is an agreement to accept a smaller sum in lieu of a larger already due, with a proviso that if the smaller sum is not paid to the day the original liability shall revive. *Rose* v. *Rose* (2), cited against us, has no application, for there Lord *Hardwicke* considered that the agreement was absolute to accept the smaller sum.

As regards the second point, we ought to be treated as mortgagees for the whole £75,000. The trust to raise that sum was not a trust for the benefit of *Hudson* only; it was a trust for the execution of which the Plaintiffs were entitled to call, and the deed of the 20th of October, 1857, was a substantial exercise of it.

The direction as to the mode of taking the accounts is inconsistent with the decree, which treats our mortgage debts as one sum; and apart from that, such a direction ought not to

(1) 19 Beav. 428. (2) Amb. 331.

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be given, as it will inconveniently fetter the person taking the accounts.

The *Attorney-General* (Sir *John Rolt*), Mr. *Jessel*, Q.C., and Mr. *H. M. Jackson*, for *Hudson* and some of his mortgagees:—

The direction to take the accounts of the mortgages severally is convenient, and the Court has power, under the *Chancery Amendment Act* (15 & 16 Vict. c. 86, s. 54), to give it. We wish to have the question decided whether the different mortgages on different properties can be tacked. If the account is taken in one, and that question is afterwards decided in our favour, the whole accounts will have to be taken over again.

The question whether the original debt is revived, or the proviso is merely a penalty, divides itself into several branches. First: If the proviso be construed literally, the agreement of January, 1854, comes to this: an arrangement that a less sum payable by instalments shall be accepted in lieu of a greater, but that if the instalments are not all paid to the day, the whole original debt shall be paid, without allowing for any instalments that may have been paid. This still stands, for the agreement of January, 1854, was to remain in force except so far as modified by that of October. We say that such a proviso is one which cannot be enforced. [THE LORD JUSTICE TURNER: It is not urged on the other side that you are not to have credit for what you have paid.] No, because such a contention would ruin their cause; but their admission that we are to have credit is inconsistent with the words, which are quite plain. The words do not provide for a remitter to the old rights, they must therefore be construed by way of penalty. The debt then was, by the agreement of January, 1854, turned into £50,000, secured by a penalty, and the agreement of October, 1854, cannot make it larger. This reasoning would apply even if the whole claim had been an undisputed debt, but it was agreed at a larger amount than *Hudson* admitted to be due, which strengthens the argument in favour of its being a penalty. Moreover, the larger claim arises on breach of any of the stipulations, which are of very unequal importance. This is decisive in favour of its being a penalty: *Chitty* on Contracts (1); *Astley* v. *Weldon* (2);

(1) 7th ed. p. 782.

(2) 2 B. & P. 346.

Kemble v. *Farren* (1); *Price* v. *Green* (2); *Reynolds* v. *Bridge* (3); *Betts* v. *Burch* (4); though it is otherwise where the consequence is attached to the stipulations severally: *Atkyns* v. *Kinnier* (5); *Lowe* v. *Peers* (6); *Price* v. *Green* (2). As to this being a penalty, *Sloman* v. *Walter* (7); *Nicholls* v. *Maynard* (8); *Seton* v. *Slade* (9), are in our favour. Where the debtor gives up nothing on breach, but is remitted to his old position, equity will not relieve: *Rose* v. *Rose* (10); but the case is different where the creditor obtains a benefit. *Ford* v. *Earl of Chesterfield* (11) was a case of voluntary reduction, the creditors getting no additional security.

Secondly: On the fair construction of the deed of October, 1854, its stipulations have been complied with. Where a good real security is given for money, the most stringent words are needed to make payment of it to the day an essential term of the contract. The fair construction is, that part was to be paid to the day, which was done; and the rest well secured by a mortgage deed providing for payment by instalments, which was also done. In the agreement of August, 1854, there is not a word pointing at time being of the essence of the contract, if we omit the parenthesis, and the parenthesis only saves a right, does not create one; and no right of reverter to the old debt was then existing, so none could be saved. The expression in the deed of 21st of October, 1854, "except on full payment, on or before, but not after," &c., is loose and inaccurate. The other side say it means that we must pay in full, without dispute as to the amount, if we fail to pay the lesser sums on the day. We say it means that, as a security, the decrees are to stand undisputed at that amount. If there is to be a reverter, we ought to be remitted to the right of appeal. The principle of the Master of the Rolls, that the proviso is in the nature of a penalty, is sound, if that point arises. We contend, however, that it does not arise, inasmuch as the stipulations have, as we say, been performed.

(1) 6 Bing. 141.
(2) 16 M. & W. 346.
(3) 6 E. & B. 528.
(4) 4 H. & N. 506.
(5) 4 Ex. 776, 783.
(6) 4 Burr. 2225.
(7) 1 Bro. C. C. 418.
(8) 3 Atk. 519.
(9) 7 Ves. 265, 273; 2 Wh. & T. L. C. 3rd Ed. 468.
(10) Amb. 331.
(11) 19 Beav. 428.

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As to taking the benefit of the trusts for raising £75,000, the Plaintiffs cannot have the benefit of them unless they were executed, and they never were executed; and, by the express terms of the trust deed, the Plaintiffs could not call for their execution.

As to the £33,000, which has been paid, it comes out of land, and we contend that it must be appropriated to that judgment which is a charge on land.

Mr. *W. W. Cooper*, for a judgment creditor, whose judgment was entered up between 1854 and 1857:—

As between mortgagor and mortgagee, the Court proceeds on the principle of regarding the strict terms of the instrument in the light of a penalty. *Carroll* v. *O'Connor* (1) shews the principle. The company here gained a valuable advantage by the deeds. They could not have enforced their judgment against the land for a year, and it would have been overridden by the creditors' deed: *Beavan* v. *Earl of Oxford* (2); *Lee* v. *Green* (3). The position of the company, therefore, was improved by the deeds.

Sir *R. Palmer*, in reply:—

The Court does not, as between mortgagor and mortgagee, act in disregard of the contract between the parties, it only disregards the strict terms so far as they are not conformable to the substantial meaning of the parties. It is very true that the Court leans against allowing a mortgagee to get anything more than his principal, interest, and costs, but here the question is, whether we are to lose part of our original debt, not whether we are to get something more than what is due. *Rose* v. *Rose* (4) was a case between the creditor and one who was not personally liable for the debt. *Carroll* v. *O'Connor* is against the Respondents, for the Lord Chancellor expressly stated that he should not have interfered if the case had been only between the debtor and creditor, and the interest of the third party had been out of the way. It is clear that up to the time when the deeds of October were executed, the company had

(1) 11 Ir. Eq. 200.
(2) 6 D. M. & G. 507: 2 Jur. N.S. 121
(3) 6 D. M. & G. 155: 2 Jur. N.S. 170
(4) Amb. 331.

not lost any of their rights; for the first agreement was only to release part of the debt if a first mortgage was given on the *Whitby* estate, which in October had not been done. The agreement in October, therefore, was a new one, the first not having been kept. The words, "without prejudice," &c., of course would not create a right, but they save, in the event of the latter agreement not being kept, all rights which the company had. Then as regards the question of appropriation, the rule is, that if no appropriation is made at the time of payment, the creditor may appropriate at any time before the case is submitted to the jury: *Smith's* Mercantile Law (1). Accounts current form the only exception: *Clayton's Case* (2); *Newmarch* v. *Clay* (3); *Hall* v. *Wood* (4); *Peters* v. *Anderson* (5). It is impossible to follow the argument that, because the money came out of land, it must be applied to the secured debt. As to the £75,000, surely a conveyance to trustees for the company redeemable on payment of £75,000 is a mortgage for that sum.

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Jan. 26. LORD CHELMSFORD, L.C., after shortly stating the nature of the suit, and of the Order appealed from, continued:—

The ground upon which the Master of the Rolls decided that the company were bound to accept the sum of £14,566 in full satisfaction of their claims under the three decrees is that, having taken a mortgage for that sum, payable in moieties on a particular day in two succeeding years, the company could not impose upon the mortgagor a condition that in the event of non-payment at the times mentioned they should have a right to recover the whole of the moneys to which they had become entitled under the decrees, as such a condition amounted to a penalty, which, in the case of a mortgage, the Court would never allow to be enforced.

Upon the argument on this appeal, it was contended on behalf of the company that the agreement between them and *Hudson*, of which the mortgage was a part, was, that they would release a

(1) 5th ed. p. 495.
(2) 1 Mer. 572.
(3) 14 East, 239.
(4) Ibid. 243, n.
(5) 5 Taunt. 596.

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portion of their debt upon certain conditions, one of which was the payment of the remainder of the money due by a particular day, and that it was agreed that if any of the conditions were broken, they should have a right to recover all the sums decreed, or admitted to be due, under the three decrees; and that the stipulation that they should be reinstated in their original rights upon *Hudson's* non-performance of his agreement was an essential part of the consideration upon which they consented to relinquish a portion of their claims.

There can be no doubt that a creditor may agree to take less than the amount of his debt, provided payment is made by a particular day, and if the debtor fails of payment at the day, the creditor may recover the whole of his debt. So he may agree to take a mortgage for a less amount than is due to him, payable at a particular day, with a proviso that if the money is not paid at the day he shall be remitted to his original demand. But if the agreement is, that the debtor shall pay part of the debt, and give a mortgage for the residue, and when the mortgage is prepared, a condition is introduced (forming no part of the original agreement) that, if the mortgage money is not paid on the day mentioned in the deed, the creditor shall be entitled to recover the whole of his debt, I apprehend this would be in the nature of a penalty, which could not be enforced in equity.

It will be necessary to examine the agreements between the company and *Hudson* very carefully to ascertain whether the entire consideration upon which the company agreed to give up a considerable portion of their demand was composed partly of payment to be made, and partly of a mortgage to be given by *Hudson*, or whether the payment of the mortgage money at a specified time entered into and formed part of the consideration, upon the non-performance of which the company were immediately to be restored to their original position.

The company had obtained a decree against *Hudson* for £54,590, and two decrees for sums to be afterwards ascertained, but claimed by the company to amount to £4104, and £14,831. *Hudson* was bound to pay a sum of £20,000 into Court on a particular day. In this state of things, the company were willing to forego the payment into Court of the £20,000, and to accept £51,000 in lieu of

the sums claimed to be due to them under the decrees, upon certain conditions.

Accordingly, by agreement dated the 30th of January, 1854, *Hudson* agreed to consent to final decrees in the two suits for the sums claimed by the company, and not to take any proceedings to avoid or reverse the decrees; to pay £21,000 out of the purchase-money of the *Newby Park* estate agreed to be sold to Lord *Downe* for £190,000; and to execute a mortgage of his *Whitby* estate for securing to the company £25,613, by three annual instalments. And the company agreed that on *Hudson* paying and securing the sums of £21,000 and £25,613, and interest, they would accept the same in full discharge of the several sums decreed or claimed to be due to them in the suits, but that in case *Hudson* should not pay and secure the said sums to the company in manner aforesaid, or if a good and satisfactory mortgage should not be executed to the company for the sum of £25,613 and interest, or, if *Hudson* should fail in performing all or any of the stipulations on his part, the company should be at liberty to recover the principal, interest, and costs decreed or claimed to be due in the said several suits.

If this agreement had been the only one between the parties, and *Hudson* had been able to give the company a first mortgage upon the *Whitby* estate, there can be no doubt that upon his paying the £21,000, and giving a mortgage for £25,613, payable by three instalments, he would have fulfilled all the conditions of the agreement on his part, and the company would not have been entitled to insist upon a right to revert to their original claims in case the mortgage money should not have been paid at the times appointed for payment.

But it being out of *Hudson's* power to release the *Whitby* estate from prior mortgages, and so to make the intended mortgage a good and satisfactory mortgage as a first charge upon the estate, the company under the terms of this agreement might, if they so pleased, have proceeded at once to recover "the principal, interest, and costs decreed or claimed to be due in the said several suits."

Instead of doing so, however, they entered into a new agreement with *Hudson* in August, 1854, which varied from the original agreement in certain particulars. This agreement was expressed

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to be without prejudice to the right of the company to recover the whole of the moneys ordered to be paid to them by the decree in the third suit, and the whole of the moneys which they were entitled to recover in the first two suits, in case the principal and interest to be secured by mortgage were not duly paid on the respective days to be appointed for payment thereof.

It was very properly argued that these words, "without prejudice," would not of themselves confer any right on the company, nor constitute an agreement that upon failure of payment of the money to be secured by the proposed indenture of mortgage, the company should be entitled to recover the whole amount of their claims. No such condition (as we have seen) is contained in the agreement of the 30th of January, 1854, and the clause is in anticipation of a right to this effect intended to be created by a subsequent deed, but which at that time had no existence.

The variations made in the agreement of the 30th of January, 1854, by this subsequent agreement, were, that the sum to be paid out of the purchase-money of the *Newby Park* estate should be £33,000, instead of £21,000, and that a mortgage upon the *Whitby* estate and other properties should be given for the balance (after certain deductions) of the £51,000, the sum agreed to be taken by the company in full of their claims by the agreement of the 30th of January, 1854, which mortgage was to be subject to a prior charge to be created by or on behalf of *Hudson* for the sum of £75,000, with interest; and *Hudson*, out of this £75,000 when raised, and the balance of the purchase-money of the *Newby Park* estate, was to pay off and discharge all existing charges and incumbrances on the premises to be included in the mortgage, and also certain debts and judgments and liens and charges upon *Sunderland* dock shares, part of the property to be mortgaged. The balance so to be secured by mortgage was to be paid by *Hudson* to the company in two instead of in three yearly instalments. And it was agreed, that on the last-mentioned mortgage being given by *Hudson* to the company, and on the before-mentioned charges, incumbrances, debts, judgments, and liens being paid off, discharged, and satisfied by *Hudson*, the company would execute and give him a proper release and discharge of their liens or charges upon his real estate;

and upon full payment of the principal and interest at the times appointed for payment thereof, execute to him a proper release and discharge of their claims upon him.

It is to be observed that in this new agreement there is no stipulation that if *Hudson* did not pay the balance due at the times appointed for payment, the company might recover the whole amount originally claimed to be due to them, but merely that upon paying off the charges and incumbrances and liens, they would give *Hudson* a release of their liens and charges on his real estate, and upon payment of the principal and interest at the times appointed, would execute a release to him of their claims.

Now suppose, the £33,000 having been paid, *Hudson* had tendered to the company a mortgage for the balance of the £51,000 amounting, after deductions, to £14,566, payable by two annual instalments, in performance of his part of the agreement, could the company have refused to accept it on the ground that it contained no stipulation that if the mortgage money was not paid at the appointed times, they should have a right to recover the whole sum claimed to be due to them. Under the agreement of the 30th of January, 1854, varied by the agreement of August following, all that the company could have a right to demand, and all that *Hudson* was bound to do, was payment of a certain sum of money, and the giving a mortgage for the residue of the £51,000, payable by instalments. The additional terms introduced into the latter agreement as to paying off incumbrances and charges upon the property intended to be mortgaged out of certain funds to be raised by *Hudson*, rendered him only liable to these consequences, that, upon his non-fulfilment of the stipulations, the company might withhold a release of their liens and charges, and as long as any part of the principal and interest of the £51,000 remained unsatisfied, they might refuse to give a release of their claims.

Having, upon a careful examination of the agreements, arrived at the conclusion which I have expressed concerning them, it appears to me to be unnecessary to notice the deeds by which provision is made for raising the £75,000 for the purpose of discharging the incumbrances and liens upon the properties agreed to

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be mortgaged, further than to say that it is carefully provided in them that the company shall not be prejudiced in any of their rights, remedies, and liens under the agreements of January and August, 1854.

The extent of the rights acquired by the company by virtue of these agreements I have already considered, and I have not been able to discover in them any such provision as is introduced into the mortgage of the 21st of October, 1854, to the effect that *Hudson* should not be at liberty to dispute the right of the company to recover the whole of the principal, interest, and costs, mentioned in the decrees, except on or until full payment by him, on or before but not after the several days thereinbefore appointed for the payment thereof, of the principal sum and interest thereby secured. It seems to me, therefore, that the mortgage must be looked at, with reference to this condition, as if it were an entirely independent transaction, because the company had no right to vary from their agreement by adding a new condition to the mortgage, upon the non-performance of which they are to be remitted to their original demand. In this view, the case resolves itself simply into that of a mortgage for payment of a sum of money on a certain day, with a proviso that if payment be not made upon the day named, a larger sum shall be recoverable. Such a proviso can be regarded in no other light than as a penalty for the non-payment of the mortgage money, which cannot be enforced in equity.

It appears to me that the company have all that they are entitled to under the agreements for securing the payment of the sum which they agreed to accept in satisfaction of their demands. They have the consent of *Hudson* to the sums mentioned in the two suits, without taking the accounts under the decrees. They have received the £33,000 out of the purchase-money of the *Newby Park* estate. They have the mortgage for the balance of the agreed reduced amount of their claims. And this mortgage is expressly declared to be in addition to and not in substitution for the charge or lien which the company may have upon the mortgaged premises by virtue of the three decrees. These decrees, therefore, are an additional security to the company for the payment of the principal and interest secured by the mortgage deed, and they may retain

their liens, and refuse a final discharge and release to *Hudson*, till the whole of the principal and interest due to them under the agreements are paid.

I agree, therefore, with the Master of the Rolls, that the accounts directed by him ought to be taken on the footing that the company are bound to accept the sums of £14,566 and £570, with interest thereon, in full satisfaction of all claims under the three decrees. I regret to find that the Lord Justice does not agree with me in this view of the case. I need not say how much my confidence in my own opinion is shaken by its wanting the support of his sound and experienced judgment.

The only further question which, upon the view I have taken, it is necessary for me to consider, is whether, in taking the accounts, the company, who are mortgagees for the sum of £75,000, are entitled as against incumbrances prior in date to their security to be allowed interest upon the whole amount of principal and interest due to them.

If the trustees, under the deed of the 20th of October, 1854, had borrowed the £75,000 from the company, and had paid off the mortgages and taken a transfer of the legal estate, the position of the company would have been very different. But the company themselves pay off the moneys due on the several prior mortgages, and then, on the 20th of October, 1857, by an indenture between *Philipson* and *Wright*, the trustees for raising the £75,000, of the first part, *Hudson* of the second part, and *Thompson* and *Seymour*, the trustees for the company, of the third part, *Philipson* and *Wright* transferred to *Thompson* and *Seymour* the £75,000 by the deed of the 20th of October, 1854, directed to be raised, and *Philipson* and *Wright* conveyed and assigned, and *Hudson* confirmed, to *Thompson* and *Seymour* the several properties comprised in the same deed, subject to a proviso for redemption on payment by *Hudson* of £75,000 and interest. Now, this deed cannot be taken to be in execution of the trusts to be performed by *Philipson* and *Wright*. It is certainly binding upon *Hudson*, and upon all persons claiming under him after the 20th of October, 1857, but not upon incumbrancers between the 20th of October, 1854, and the date of the deed in question. The order of the Master of the Rolls will require a slight alteration in this respect.

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With this alteration the order, in my opinion, ought to be affirmed.

SIR G. J. TURNER, L.J.:—

In this case I have the misfortune to differ from the Lord Chancellor and the Master of the Rolls, and I need not say how sincerely I regret that this difference should have arisen between us, or how much I feel that the opinion which I have formed upon the case is, in all probability, a wrong and unfounded opinion. Having, however, arrived at a different conclusion upon the case, I feel bound to state the grounds upon which my opinion is founded.

[His Lordship then, after stating the facts of the case down to the agreement of the 30th of January, 1854, inclusive, continued:—]

The first, and perhaps not the least important, question in this case is, what is the true construction and effect of this agreement, and I think that it is this—that if the £21,000 was paid by Viscount *Downe*, and the security agreed to be given by the Defendant *G. Hudson* was given by him at the stipulated time, the payment and security were to be taken by the railway company in full discharge of their claims under the decrees, but that if the £21,000 was not paid by Lord *Downe*, or the security was not given by the Defendant *Hudson* at the stipulated time, the company were to be entitled to recover the full sums decreed to or claimed by them in the several suits, and to hold the same for their own benefit. I think so for this reason, that the case of default being made in the payment or in the giving of the security is put in direct contrast and opposition to the case of the payment being made and the security given. The only doubt which has occurred to me on this point has arisen from the 4th clause of the agreement, which evidently points to the sums recovered under the decrees being held as security for the reduced amount payable under the agreement, but of course the agreement must, if possible, be construed so as to render it consistent in all its parts, and this, I think, may well be done by holding, as I think it ought to be held, that the 4th clause applies to a case in which there has been no default, and the last clause to the case in which default has been made.

[His Lordship then stated the deed of the 16th February, 1854, and continued:—]

If this deed had rested at the proviso for redemption on the payment of £51,000, on the 6th of April, 1854, it might perhaps have been considered to afford some evidence that the £51,000 was the whole sum which was to be considered to be due to the railway company, though even in that case it would seem that the deed must have been considered with reference to the agreement under which it was given, and according to which the larger sum was to be payable if the £51,000 should not be paid on the 6th of April, 1854, but it does not rest there, and the subsequent proviso seems to me wholly to prevent any such argument as I have referred to being applied to the case. As I understand it, it keeps alive the charge created by the decrees for the £51,000 if the £51,000 only should become payable, and for the whole amount if the whole amount should become payable; and it is further to be observed upon it, that it treats the mortgage created by this deed as an addition to, and not a substitute for, the charge created by the decrees; so that after the execution of this deed, the *York and North Midland Railway Company* had not only the charge created by the decrees, but this mortgage also, as a security for what was due or might become due to them. Some reliance was placed, on the part of the Respondents, upon this deed having been accepted by the company, although not executed until after the expiration of the fourteen days mentioned in the agreement, and this, it was said, amounted to a waiver on the part of the company. It may well be that the acceptance of it was a waiver by the company of any objection on the ground of its not having been executed within the fourteen days, but I do not see how, consistently with the terms of the proviso, it can be held to have amounted to any further waiver.

[His Lordship then stated the subsequent facts of the case.]

It is upon the foregoing deeds and agreements that the question of construction, argued upon the part of the Respondents, depends; and, looking to the terms of these deeds and agreements, and of the provisoes contained in them, to the continual reservation made by them of the rights of the Plaintiffs under the decrees, and to the careful provisions which they contain that the securities

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created by them are to be taken by way of addition, and not of substitution, for those rights—I cannot bring my mind to think that the argument of the Respondents upon this point of construction can be maintained. The terms imposed upon the Defendant *Hudson* by these deeds and agreements may have been (though I do not mean to intimate that they were) hard upon him; but with this we have nothing to do. No proceedings have been taken to impeach these deeds and agreements, and we must deal with them as they stand before us. Upon this part of the argument, therefore, my opinion is in favour of the Plaintiffs, and I have had less difficulty in coming to that conclusion, as I do not collect from the judgment of the Master of the Rolls that His Lordship entertained a different opinion.

I pass, then, to a further argument, which was much urged before us on the part of the Respondents, and on which the judgment of the Master of the Rolls appears to have proceeded, that the provisions contained in these deeds and agreements for bringing the decrees into operation to secure the payment of the larger sums payable under them, upon default being made in payment upon the appointed days of the less sums by the deeds and agreements stipulated to be paid, are penal stipulations, to which effect cannot and ought not to be given by the Court; but with all respect to the argument on this point, which was strongly and ably urged, and to the judgment of the Master of the Rolls, my opinion is that this argument also cannot be supported. In ordinary cases of stipulations for payment of a larger sum upon default being made in payment of a less sum at an appointed time, there is nothing but penalty to which the stipulation can be referred, and neither this Court nor a Court of law in such cases gives effect to a mere penalty, but this case seems to me to differ widely from the ordinary cases. In this case there was a debt due from the Defendant *Hudson* to the Plaintiffs, and what is provided by these deeds and agreements is—that a sum less than the antecedent debt should be accepted in discharge of it, upon security being given, and the less sum being paid upon an appointed day. No doubt can be entertained that this part of the agreement was perfectly valid. Stipulations may always be made that a less sum shall be taken in discharge of a greater, and such stipulations

are valid if there be consideration for them. This part of the agreement, then, being valid, can it be said that a further stipulation that if the less sum be not paid on the appointed day, the larger sum shall continue to be payable is invalid? I think not. In ordinary cases, a party stipulating for the payment of a larger sum upon default being made in payment of a less sum at an appointed time, gives up nothing, but in the case of an antecedent debt he gives up the difference between the amount of the debt and the less sum stipulated to be paid in consideration of the less sum being paid at the appointed time. This, as it seems to me, is not a case of penalty, but of mutual agreement: the one party agreeing to take the reduced amount in consideration of the other agreeing to pay it at the stipulated period. Such an agreement cannot, as I conceive, be good in part and bad in part; and can the party making default take the benefit of the agreement, as in this case he has done, by obtaining delay in payment until the period for payment arrives, and then turn round and say that the agreement is altogether void? No case that I can find has gone the length of applying the doctrine as to penalties to such a case as this; and with all respect to the opinion of the Master of the Rolls, I cannot see my way so to apply it. Lord *Hardwicke* certainly does not seem to have thought that it could be so applied, as appears from what was said by him not only in *Rose* v. *Rose* (1), but in *Ex parte Bennet* (2). It was attempted on the part of the Respondents to maintain that in this case there was no antecedent debt when the agreements were entered into; but the £54,590 at least seems to me to have been due at those times. Several cases at law were also referred to in support of the Respondents' argument on this part of the case. I do not think it necessary to enter into an examination of those cases; it is, I think, sufficient to say that in my opinion they do not apply to a case like the present. Some argument was also attempted to be raised upon the part of the Respondents, that these deeds operated as a clog upon the equity of redemption. But this point does not seem to me to arise, as the mortgages here are taken as additional securities. Possibly there may be cases in which it may be so clear that the deeds or instruments have been made or entered into for the mere purpose of

(1) Amb. 331. (2) 2 Atk. 527.

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evading the law of the Court against the enforcement of penalties that the Court would not give effect to them, but there is no such case here. For the reasons which I have stated, my opinion differs from that of the Master of the Rolls upon this part of the case, and I think the proper order to be made upon it is to declare our opinion to that effect, and to direct the accounts to be taken upon that footing.

Another point which was argued before us on this appeal arises thus: the £75,000 which, under the trusts of the deed of the 20th of October, 1854, was to be raised by *Philipson* and *Wright*, and applied in the payment of incumbrances, was not raised by them, nor were the incumbrances for the payment of which it was to be raised paid by them or by the Defendant *Hudson*, but the company, between the 18th of February and the 20th of October, 1857, paid upwards of £75,000 for principal and interest upon these incumbrances, taking assignments of the incumbrances, and by an indenture dated the 20th of October, 1857, and made between *Philipson* and *Wright* of the first part, the Defendant *Hudson* of the second part, and *Thompson* and *Seymour* of the third part, the £75,000, and all the property which was vested in *Philipson* and *Wright* in trust for raising that sum, were conveyed and assigned by them and by the Defendant *Hudson* to the company by way of mortgage for securing the sum of £75,000 with interest thereon. Under this deed the company claim to be incumbrancers upon the property comprised in it for £75,000 and interest, it being for their advantage to do so, inasmuch as part of the £75,000 paid by them to the incumbrancers consisted of interest, and by succeeding in this claim they would obtain interest upon this interest. The Master of the Rolls, however, held that this claim on the part of the company, though good against the Defendant *Hudson*, was not good against any mortgagee of his subsequent to the Plaintiffs, and accordingly by the order under appeal he declared his opinion to be that the accounts ought, as against the mortgagees who were subsequent to the Plaintiffs, to be taken upon the footing that the Plaintiffs *Thompson* and *Seymour* were not entitled to any charge on the mortgaged properties under the deed of the 20th of October, 1857, or to charge against the said mortgaged properties any sums except the sums respectively due on the several mortgages and in-

cumbrances transferred to them, and directed the accounts to be taken accordingly. I think that this part of the order is in substance right. That this deed was binding upon the Defendant *Hudson* I entertain no doubt, but on looking into the deed I think that it cannot be said to have been made in due execution of the trusts reposed in *Philipson* and *Wright*. It is recited to have been made in pursuance of an arrangement between the parties to it, and it purports to give additional security to the company, which under the trusts of the deed *Philipson* and *Wright* had no power to give. It could not, therefore, as I think, bind the subsequent incumbrancers, who were no parties to it. I rather think, however, that the order goes too far in making the declaration of opinion applicable to all subsequent incumbrancers. The declaration ought, as it seems to me at present, to have been limited to subsequent incumbrancers prior in date to the 20th of October, 1857, as, if the Defendant *Hudson* was bound by the deed, it would seem that those claiming under him after that date must be bound by it also. I throw this out, however, subject to any observations which may be made upon it, as the point was not referred to in the argument.

There is another direction contained in this order which was objected to on the part of the Appellants, that the amounts due on the several mortgages to which the Plaintiffs are entitled be separately certified without prejudice to any question. This, I think, is a matter which had better be left open until the cause is heard for further consideration, when the rights of all the parties will be more distinctly before the Court. In the result it may not be necessary that any such separation of the accounts should be made.

Another point was raised upon this appeal as to the appropriation of the £33,000 paid by Viscount *Downe* to the company, but I do not find that this question is in any way affected by the order under appeal, or that the Master of the Rolls has given any opinion upon it, and certainly I am not disposed in a case of this description to assume original jurisdiction upon a question which, as it seems to me, may well be left until the hearing of the cause for further consideration.

The order upon this appeal ought therefore, in my opinion, to be

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such as I have above pointed out, and I think that the costs of all parties of the appeal should be costs in the cause.

Solicitors for the Plaintiffs: Messrs. *Williamson, Hill, & Williamson.*

Solicitors for the Defendant: Messrs. *Elmslie, Forsyth, & Sedgwick.*

L. C. and L. J. T. 1866 *Dec.* 7, 8, 10. 1867 *Jan.* 26.

4 Ch 138

HOOPER *v.* GUMM. McLELLAN *v.* GUMM.

Foreign Ship—Registry—Indorsement—Mortgagee—Notice.

Certain shipbuilders in *America* built several ships, mortgaged them there, sent them to *England* for sale, sold them there, and paid the mortgagees in *America*. The mortgages were duly registered in *America*; but notice of the mortgage having been indorsed on the certificate of registry in one case, and having impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold; the shipbuilders received the purchase-money, and failed, leaving the mortgagee unpaid. The mortgagee filed his bill to establish his claim against the purchaser:—

Held, that the rights to the ship acquired under *American* law must be recognised; but that the purchase, having taken place in this country, must be governed by *English* law:

That a ship is not like an ordinary chattel, which passes by delivery, and that there is no market overt for ships:

That the purchaser of a foreign ship is bound to make inquiries as to the title:

That in this case the mortgagee had so acted as to suppress the mortgage, and to make the shipbuilders his agents for the sale, and that he could not maintain his claim against the purchaser.

Decree of *Wood*, V.C., reversed.

THESE suits were instituted by mortgagees of a ship against the purchaser of the ship and other parties for recovering the amounts due upon the mortgages.

C. F. Gardner & H. D. Gardner were shipbuilders at *Boston* in *America*, and were in the habit of sending ships built by them to *England* and other countries for sale. Amongst the ships thus sent by them were four, called the *Laughing Water*, the *Cashmagar*, the *Leaping Water*, and the *Edward Everitt*. *Hooper*, the Plaintiff in the first of these suits, was a merchant at *Boston*,

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and was in the habit of making advances to the *Gardners* upon the security of the ships built by them, to be repaid out of the proceeds of the ships when sold, and he made advances to the *Gardners* upon each of the four ships above mentioned. In conformity with the laws of the *United States* as to the registry of ships and mortgages, all the above-mentioned mortgages were duly recorded in the office of the Commissioners of Customs at *Boston*, and in the case of the *Laughing Water* notice of *Hooper's* mortgage was also indorsed upon the certificate of registry, but his mortgages upon the other ships were not, the indorsement upon the certificate of the *Laughing Water* having occasioned some difficulty in the sale of her, and he having therefore agreed that in future no notice should be so indorsed.

The *Laughing Water* was built in the year 1857, and sold in *England* in that year, and *Hooper's* mortgage upon her was duly paid out of the proceeds of the sale. The *Cashmagar* was burnt at sea. The *Leaping Water* was also sold in England, and *Hooper's* mortgage upon her was duly paid; but with reference to the *Edward Everitt* the questions in these suits arose.

By a bill of sale, dated the 9th of May, 1860, and recorded as above mentioned, this ship was mortgaged to the Plaintiff *Hooper* by *C. F. Gardner*, in whose name she was registered, for securing the sum of 25,000 dollars; and by another bill of sale, dated the 31st of May, 1860, she was mortgaged by *C. F. Gardner*, to the Plaintiff *McLellan*, for securing the sum of 10,000 dollars, and this mortgage was also recorded, but no notice of either mortgage was indorsed on the certificate of registry. By a power of attorney, dated the 30th of May, 1860, *C. F. Gardner* authorized and empowered *McLellan* to sell the ship and receive the proceeds of the sale, and on the same day gave him instructions by letter to pay *Hooper's* mortgage out of the proceeds of the sale. With this power of attorney and these instructions, *McLellan*, who was the captain of the ship, brought her over to *England*, but was unable then to sell her, and he returned back with her to *America*. She was afterwards again sent to *England* for sale, in charge of *McLellan*, who still held the power of attorney and the letter of instructions. Immediately upon his arrival he put himself in communication with the Defendant *Charles Gumm*, a shipbroker in

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London, with whom he had acted with reference to the sale of the ship on the occasion of his having first brought her to *England* for sale, and who had also acted for the *Gardners* in the sale of the *Leaping Water*. Within a few days after *McLellan* had arrived in *England*, *H. D. Gardner* also arrived in *England*, and brought with him a later power of attorney from *C. F. Gardner*, revoking the power of attorney which had been given to *McLellan*, and authorizing *H. D. Gardner* to sell the ship and receive the proceeds of the sale. *H. D. Gardner* also put himself in communication with *Gumm*, and ultimately, on the 1st of April, 1861, he agreed to sell the ship to *Gumm* for £10,000, and afterwards, by bill of sale, dated the 30th of May, 1861, conveyed the ship to him. In the meantime *McLellan* had returned to *Boston*, leaving *England* about the middle of April, and arriving at *Boston* on the 1st of May, 1861, part of the purchase-money having been paid before and part after his departure. Immediately upon his arrival, he communicated to *Hooper* that the ship had been sold to *Gumm*. *H. D. Gardner* also returned to *Boston*, where he arrived in June, 1861, and very soon afterwards *C. F. Gardner & H. D. Gardner* stopped payment and went into insolvency.

On the 22nd of August, *Hooper* filed his bill in this suit against *Gumm*, claiming to be the legal mortgagee of the ship, and *McLellan* filed a similar bill. The *Gardners* were afterwards made Defendants. *Gumm*, by his answers, claimed to be a purchaser without notice; and evidence was entered into by both parties as to the facts of the sale as shewing notice, as to the law of the *United States* with respect to registry and indorsements, and as to the usual mode of selling American ships in *England*, the effect of which evidence will be found in the judgments of their Lordships.

Both causes were heard before Vice-Chancellor *Wood*, who made a decree in *Hooper* v. *Gumm*, that *Hooper* was entitled to his charge on the ship as mortgagee, and dismissed the bill in *McLellan* v. *Gumm*, on the ground that *McLellan* had so acted as to lead *Gumm* to believe that there was no charge on the ship.

Gumm appealed in *Hooper* v. *Gumm*, and *McLellan* appealed in *McLellan* v. *Gumm*. Both appeals were argued in June, 1866, before the Lords Justices *Knight Bruce* and *Turner*, and judgment

was reserved. The Lord Justice *Knight Bruce* having resigned before judgment was delivered, the two appeals were now again argued before the Lord Chancellor and the Lord Justice *Turner*.

Sir *Roundell Palmer*, Q.C., and Mr. *Dickinson*, Q.C., for *Gumm*, as to the authority given by *Hooper* to sell, cited *Dann* v. *Spurrier* (1); *Perry Herrick* v. *Atwood* (2); *Duke of Beaufort* v. *Neeld* (3). The contract is governed by English law, and it may well be that by the American law a registered mortgage is notice to all the world; but that does not affect a purchaser here. This may have been a valid security in *Boston*, but certainly is not so here: *Simpson* v. *Fogo* (4). We do not say that this is a planned fraud by *Hooper*, but it is an after-thought when he found himself likely to lose his money by the failure of the *Gardners;* and he always intended them to have full power to sell and receive the money.

The *Attorney-General* (Sir *John Rolt*), and Mr. *E. K. Karslake*, Q.C., for *Hooper*:—

We maintain:—1. That *Hooper* has the legal property; 2. That a ship is not a chattel as to which property can be acquired by a sale in market overt or otherwise; 3. *Hooper's* legal title could not be taken from him except by a sale by him or his agent; 4. His equitable title could not be taken away except by conduct amounting to fraud; 5. *Hooper's* knowledge that the ship was to be sold will not signify, unless he is shewn to have made the *Gardners* his agents; 6. *Gumm's* alleged want of notice is immaterial; 7. But he had notice; 8. The onus of proof is on him.

First: About the legal property there is no question. Second: A ship is not an ordinary chattel, either here or in *America*, but the property in her is governed by the law of the port to which she belongs: *Abbot* on Shipping (5); *Simpson* v. *Fogo* (4). If any other law prevailed it would be impossible to trust a ship out of her own country. As to the mortgagor being in possession, that is nothing, as he always is. The registered mortgagee is perfectly justified in standing by, and not interfering with, a sale by the mortgagor,

(1) 7 Ves. 231.
(2) 25 Beav. 205; 2 De G. & J. 21.
(3) 12 Cl. & F. 248.
(4) 1 J. & H. 18; 1 H. & M. 195.
(5) Page 1.

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relying on his register, and that no one will buy without coming to him. As to the want of indorsement on the certificate, none is required by the American law, according to our witnesses, and the general commercial law does not apply, as the whole matter is regulated by statute.

Mr. *Kekewich*, for *McLellan*.

Mr. *G. M. Giffard*, Q.C., and Mr. *Druce*, Q.C., for the *Gardners*, read evidence to shew that there was in fact nothing due to *Hooper* or *McLellan* on their mortgages.

Sir *R. Palmer*, in reply, in *Hooper* v. *Gumm*.

Mr. *Kekewich*, in reply, in *McLellan* v. *Gumm*.

1867 Jan. 26. LORD CHELMSFORD, L.C., after stating the facts, continued:—

As the *Edward Everitt* was built expressly for sale in this country, and the Plaintiff *Hooper* advanced his money upon her, knowing the object, and for the express purpose of furthering it, he may fairly be considered to be in the same situation as a vendor. His legal title to the ship would, of course, be determined by American law; but the contract of sale and the effect of the intervention of the title of a *bonâ fide* purchaser for valuable consideration must be governed by the law of *England*, where the contract was made.

The Plaintiff *Hooper* being a party to the intended sale in this country, through which he was to obtain payment of his advances, may be presumed to have known that the probable consequence of the copy of the register containing no notice of his mortgage, would be—that the ship might be purchased, and the money paid to the agent for sale, without any inquiry as to incumbrances. If, therefore, he chose to permit the certificate to appear without any indorsement of his mortgage upon it, he should have taken care that notice of his claim was given to a purchaser. But the absence of all notice of the mortgage upon the certificate of registry did not arise in this case from reliance upon the Plaintiff's title

under American law, nor from considering it unnecessary for the Plaintiff's protection, but the mortgage was advisedly kept off from the certificate, for the purpose of facilitating the sale of the ship. In a previous transaction between *C. D. Gardner* and the Plaintiff *Hooper*, with respect to a vessel called the *Laughing Water* (which transaction was exactly similar to that relating to the *Edward Everitt*), difficulty and delay had arisen in the completion of the purchase in consequence of the mortgage to the Plaintiff *Hooper* being indorsed upon the certificate. In order to prevent a similar obstruction to the sale in the case of the *Edward Everitt*, it was agreed that the Plaintiff's mortgage should not appear upon the certificate of registry. There was, therefore, an intentional concealment of the fact by the Plaintiff *Hooper*, which as against him may be taken to amount to a representation that there were no incumbrances upon the ship, and he was therefore bound to take care to correct the impression which was intended to be conveyed by the appearance of the certificate, by communicating the fact of his interest to a purchaser. Whether any such communication was made to the Defendant will be presently examined.

His Lordship then stated the facts relating to the power of attorney, and came to the conclusion that *Hooper* was kept in ignorance of the facts, and that *McLellan* was allowed by the *Gardners* to sail in the *Edward Everitt*, in order to blind *Hooper's* eyes, and make him believe that *McLellan* still held and was intended to hold an efficient power of attorney, while the *Gardners* were scheming to supersede him, and get the purchase-money of the ship into their own hands. Under these circumstances, the Plaintiff might have stood upon his legal title to the ship, and the Defendant must have suffered the loss which had been occasioned by the fraud of the *Gardners*, if the Plaintiff had not intentionally permitted them to possess the means of making that fraud available. It was distinctly proved that the Plaintiff agreed to allow the *Gardners* to have a clean register of the ship, in order that the sale might not be impeded. He, therefore, so far as the ship's documents were concerned, was a party to the concealment of his claim. Even if the evidence left it a matter of doubt whether the appearance which the certificate presented was in itself proof that the ship was free from incumbrances, or that inquiry

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should have been made upon the subject, still in a case like the present, where the very object of the Plaintiff was to keep his mortgage from the knowledge of persons dealing for the purchase of the ship, his legal title, thus intentionally concealed, ought not to prevail against a purchaser, unless it could be proved that he in some manner had distinct notice of it before his purchase, or before the payment of the whole of the purchase-money. It must, however, be held upon the evidence that no such notice was given to the Defendant, and so the Vice-Chancellor seemed to have thought. The appearance of the certificate of registry was calculated to lead purchasers to believe that the ship was free from incumbrances, and the Plaintiff could not thus deal with his legal title, and at the same time render it available against a purchaser, as if he had knowledge of it. In the competition between the parties, the Plaintiff had disabled himself from standing merely on his legal title, and the claim of the Defendant as a purchaser for valuable consideration without notice must prevail, and the decree of the Vice-Chancellor must be reversed.

The case of *McLellan* was much weaker than that of *Hooper*, as he might be said literally to have stood by without the least assertion of his claim. The decree of the Vice-Chancellor in his case ought to be affirmed, and the appeal dismissed with costs.

SIR G. J. TURNER, L.J., after stating the facts and the pleadings in both suits, continued :—

These appeals involve questions of much importance, and no inconsiderable difficulty. It will be convenient to deal with them separately, and first, as to the appeal from the decree in the suit of the Plaintiff *Hooper*.

Three points were mainly relied upon in support of this appeal. 1st. That a purchaser of a foreign ship is entitled to proceed in his purchase upon the footing of what may appear upon the ship's papers, and is not bound to make further inquiry into the title to the ship ; 2ndly. That the Plaintiff *Hooper* intentionally withheld notice of his mortgage, and assented to the sale of the ship being made by the *Gardners*, and under their title, and that this assent on his part ought to be held binding upon him in favour of the Appellant, the purchaser ; and, 3rdly. That the Plaintiff, if he had

not acquiesced in the purchase, had at all events so conducted himself as to disentitle him from impeaching it. On the part of the Plaintiff it was argued, in support of the decree, that he had the legal title to the ship, and that his title could only be displaced by proof that he had authorized or sanctioned the sale, or had been guilty of conduct amounting to fraud with respect to it, and that no such case was proved against him. It was further contended on his part that the Appellant ought to be held to have had notice of the mortgage. Some question was raised in the course of the argument before us, as to the law by which this case ought to be decided; and though this point was not much gone into on either side on this occasion, it was more fully discussed when the case was argued before the late Lord Justice and myself: and it may be right for me therefore to say, that in my opinion the law of this country ought to govern the decision of the case, for the purchase of the ship, on which the rights of the question depend, was made and completed in this country. In saying this, however, I must not be understood to mean that the shipping law of *America* is not to be regarded in deciding the case: on the contrary, I think that great regard must be paid to it. In order to determine what the rights of these parties now are, it must be ascertained what their rights were at the time when the purchase in question was made, and in order to ascertain this, resort must be had to the American shipping law. The rights of the parties stood upon that law at the time when this purchase was made, and I apprehend that where rights are acquired under the laws of foreign states, the law of this country recognises and gives effect to those rights, unless it is contrary to the law and policy of this country to do so. There is nothing, so far as I am aware, opposed to the law of this country in the recognition of the rights of an American mortgagee in an American ship; and so far as the policy of this country is concerned, it is obvious that, unless the Courts of this country recognise rights acquired under the laws of foreign states, those foreign states would not recognise rights acquired under our laws, and the consequence of this would be that no mortgagee of a British ship could with safety allow the ship to go to any foreign port under the control of the mortgagor, the owner of the ship, and all investments of money

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upon mortgages of ships would, to say the least, be rendered insecure.-

I take it, therefore, that in this point of view, regard must be had to the American shipping law, and, looking to the *Registry Act* of the *United States*, which the Plaintiffs have put in evidence, and to the opinions of the counsel in *America* upon the effect of that Act, no reasonable doubt can, I think, be entertained that, according to the law of *America*, the legal interest in this ship was, at the time when the Appellant became the purchaser of her, well and effectually vested in the Plaintiff *Hooper*. This point, therefore, must be assumed in the Plaintiff *Hooper's* favour.

We come then to the question whether the purchaser of a foreign ship is entitled to proceed in his purchase upon the footing of what may appear upon the ship's papers, or is bound to make further inquiry into the title to the ship—a question certainly of great importance. In the view which I have ultimately taken of this case it is not necessary for us to give any opinion upon this point, nor do I intend to give any final opinion upon it. I say no more than that, as at present advised, I am of opinion that the purchaser is bound to make inquiry into the title. A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships; in the case of American ships the laws of the *United States* provide the means of evidencing the title to them. In ordinary cases of purchases of property not purchased in market overt the purchasers are bound to inquire into the title to the property purchased by them. They cannot shut their eyes and ears and claim the benefit of want of notice; and if they think proper to buy without inquiring into the title of the persons from whom they buy, they must be held to be affected with notice of what would have appeared if the inquiry had been made.

It is true that there is in this case strong evidence that, in the cases of purchases in this country of American ships, it has not been usual that inquiries into the title should be made; but this may well have arisen from the purchasers having felt that they were safe in relying upon the *bona fides* of the vendors. This, no doubt, would generally be the case; and it is only where there has

been *mala fides* on the part of the vendors that the question of the obligation upon the purchaser to inquire can arise. At all events, the course which has been pursued in the purchases of property of this description cannot, in my opinion, alter the law. This point, therefore must, I think, also be ruled in favour of the Plaintiff *Hooper*.

The only material question which then remains is, whether the Plaintiff *Hooper* ought to be held to have authorized the sale in question, or to have so acted with respect to it as to disentitle him from impeaching it, and I agree with the Vice-Chancellor, that this is the real question in the cause. Now, the evidence quite satisfies me that this Plaintiff intended that this ship should be sold by the *Gardners*, and under their title, and without his mortgage being disclosed to the purchaser. In the case of the *Laughing Water* his mortgage had been indorsed upon the certificate of registry, and in consequence of this indorsement difficulties arose with the purchaser of the ship, and the completion of the purchase was long delayed. In order to prevent these difficulties and this delay arising in other cases, he agreed that for the future his mortgages should not be indorsed upon the certificates of registry of the ships which should be mortgaged to him. He thus, as it seems to me, put it into the power of the *Gardners* to sell to purchasers without notice of his mortgages, and not under his title, but under their title. It cannot be said on his part that he did this in reliance upon inquiries being made by the purchaser, which would disclose his mortgages, for the very object with which he did it was to avoid inquiries being made, and it cannot of course be said that he did it with intent to charge the purchasers, for this would be a fraud on his part, and I am far from thinking that any fraud was contemplated by him.

Let us consider then the effect of what was thus done by him. There is not only a deliberate intention of suppressing the mortgage, but a power given to the *Gardners* to sell, under their title, and not under his. I should feel great difficulty in holding that, after such conduct on his part, he could maintain any claim in equity against a purchaser from the *Gardners;* but the case seems to me to stand yet higher against him, for what was done by him amounts, I think, to an authority to the *Gardners* to sell for them-

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selves and for him. He in effect constituted the *Gardners* his agents to sell the ship, and it was not attempted to be denied, nor could it be denied, that if he did this the bill in this suit could not be maintained. That he intended to authorize, and did authorize, the sale of the ship by the *Gardners* is, I think, confirmed by the evidence in the cause. It is plain, from the evidence, that he placed great trust and confidence in the *Gardners*. His own letters prove it. The fact of his having received from the *Gardners* the moneys secured to him by his mortgages on the *Laughing Water*, and the *Leaping Water*, ought not perhaps to be relied upon against him, as it may be accounted for by the indorsement upon the certificate of registry in the one case, and by the power of attorney, which was stated at the bar to have been given by him in the other. But there is this further fact in this case, he had notice of this ship having been sold by the *Gardners* to the Appellant at least as early as the 1st of May, 1861; and it was not until the 18th of June in that year, when the *Gardners* were upon the point of failing, that he began to raise any question upon the sale, having in the meantime left the purchaser to pay, as he did in fact during that interval pay, a considerable part of the purchase-money.

It was said, however, on the part of the Plaintiff *Hooper*, that assuming him to have authorized the sale of this ship by the *Gardners*, he authorized it only if the sale was made under the power of attorney given to *McLellan;* but I do not think that the Plaintiff's case can, either in point of law or in point of fact, be maintained upon this point. In point of law I do not think he could throw upon the purchaser from the *Gardners* the obligation of inquiring into the circumstances under which the power of attorney to sell was given. It would be sufficient for the purchaser to be satisfied that it was given by the person who was authorized to sell, and in point of fact there is neither allegation nor proof that the Plaintiff acted upon the faith of *McLellan's* power of attorney being continued in force. The evidence, I think, proves the contrary; for in the correspondence between the Plaintiff and *McLellan*, when *McLellan* was leaving *America* on the second occasion of his coming with the ship to *England* for the purpose of selling her, the Plaintiff was distinctly told by

McLellan that *H. D. Gardner* was coming to *England*, and that a power of attorney to sell the ship might be given to him. Surely, if the Plaintiff had relied upon the continuance of *McLellan's* power he would at once have protested to the *Gardners* against any such power being given to *H. D. Gardner*. It may be, and I have little doubt, that fraud was practised by the *Gardners* upon the Plaintiff, but I cannot see my way to hold that the Appellant can be affected by that fraud.

The question of acquiescence, upon which the Appellant also relied, is not, I think, of any weight, otherwise than as evidencing the Plaintiff's assent to the sale, and I do not, therefore, enter further into it.

For the reasons which I have stated, my opinion is, that this decree cannot be maintained, and that this bill ought to have been dismissed; but as there has certainly been a want of caution upon the part of the Appellant, I think it should have been dismissed without costs, and of course there will be no costs of the appeal.

As to the other appeal, that of the Plaintiff *McLellan*, I think it sufficient to say that the case against him is, in my opinion, stronger in some parts than the case against the Plaintiff *Hooper*, and that his bill therefore was properly dismissed. And for the same reasons as in the other case I think that it was properly dismissed without costs. The order upon this appeal, therefore, will be simply to dismiss the appeal with costs.

Solicitors for the Plaintiffs in both suits: Messrs. *Freshfields & Newman.*

Solicitors for the Defendants: Messrs. *Cotterill & Sons.*

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WILLIAMS *v.* WILLIAMS.

Family Arrangement—Consideration.

A. died in 1831, possessed of real estates of socage, gavelkind, and borough English tenure, and also of leaseholds, stock in trade, and other personal property, leaving a wife and two sons. He made a will by which, after certain provisions for his wife, he gave all his property to his two sons equally; but this will was not admitted to probate, being incomplete. At an interview between the brothers shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, and that the property should be "not mine or thine, but ours." No agreement in writing was made, but for twenty years after the death of *A.* the two sons carried on the partnership together, and dealt with the whole property, real and personal, as if it belonged to them equally, and the widow never insisted on her rights in her husband's property. In 1851, the partnership was dissolved. The younger brother having died, his representative filed a bill for the equal division of the property:—

Held (affirming the decree of *Kindersley*, V.C.), that there was sufficient evidence of a family arrangement which the Court would uphold, although there was no formal contract between the parties.

A family arrangement may be such as the Court will uphold, although there are no rights in dispute; and if sufficient motive for the arrangement is proved, the Court will not consider the *quantum* of the consideration.

Per Lord *Chelmsford*, L.C.:—Whether the younger brother had not acquired a title at law to a moiety of the socage estates by possession for more than twenty years—*Quære.*

THIS was an appeal from a decree of Vice-Chancellor *Kindersley*, made in two suits between the same parties (1). The first suit was instituted by persons representing the real and personal estate of *Samuel Williams*, deceased, against his brother, *John Williams*, for the purpose of determining the rights of the two brothers in certain real estates, the Plaintiffs alleging that a family arrangement had been made between them, that they should be equally entitled to those estates, and the Defendant, *John Williams*, denying any such arrangement.

The second suit was instituted by the same Plaintiffs, to take the accounts of the partnership which had been carried on between the two brothers.

The property of *John Williams*, the father of *John* and *Samuel*

(1) Reported 2 Dr. & Sm. 378.

Williams, at the time of his death consisted of freeholds of common socage, of gavelkind, and of borough English tenures, of leaseholds, and stock in trade, and other personalty. Part of the property he had acquired under the will of *John Williams*, the grandfather, and the rest he had himself purchased.

The grandfather by his will devised certain freeholds in *Bermondsey*, and lands held in gavelkind at *Deptford*, to his two sons, *John Williams*, the father, and *James Williams*, for their lives, as tenants in common, with limitations over and an ultimate limitation on a certain event to the survivor, his heirs and assigns. *James* survived his brother *John Williams*, the father, and afterwards died without issue and intestate on the 29th of December, 1840.

John Williams, the father, carried on the business of a tanner in some leasehold premises at *Greenwich*, and in freehold premises in *Lime Street*, *London*, both of which he had purchased.

John Williams, the father, died in November, 1831, leaving his two sons, *John* and *Samuel*, and his widow, surviving him. After his death a testamentary paper was found, which was signed by him, and dated 10th of January, 1824, but being without witnesses was not a valid devise of his real estate; and having the word "witness" after the date, but no witness's name, it was held to be incomplete, and was not admitted to probate. By that document he purported to give the whole of his property, real and personal (subject to certain provisions for his widow during his life), to his two sons equally.

John Williams, the father, having died intestate, and having left real estates of different tenures, his two sons became equally entitled to such parts as were of gavelkind tenure, *John Williams*, the elder son, became exclusively entitled to the socage parts; and the younger son, *Samuel*, became exclusively entitled to the borough English portion. The socage portion was, however, much larger than the borough English portion. The personal estate was divisible between the widow and the two sons in equal shares; and the widow was also entitled to dower and freebench out of the real estates.

In this state of things, on the death of the father, the two brothers continued the tannery business on the same premises

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at *Greenwich* and in *Lime Street*, where it had been previously carried on, till, on the 6th of November, 1851, upon some disagreement between them, the Appellant, *John Williams*, served a notice of dissolution, and the partnership was brought to an end.

Shortly after the testamentary paper left by *John Williams*, the father, had been refused probate, an interview took place between the two brothers, at which a witness named *Smitheman* was present, when the Defendant, *John Williams*, declared in effect that the invalidity of the will should make no difference between himself and his brother, but that the property should be "not mine or thine, but ours;" and he repeated the same expressions on subsequent occasions.

During the whole of the period which elapsed between the death of the father and the dissolution of the partnership, all the real and personal property which had belonged to the father at the time of his death was treated and dealt with as the common property of the two brothers, the elder brother never having at any time asserted or assumed any exclusive ownership over it. The proof of the property having been so dealt with was of various kinds. The result of the evidence on this subject may be stated shortly as follows:—It appeared that the rents of the estates were paid into the same account at the bankers, kept in the names of the two brothers, to which the profits of the tannery business were carried, and that all outgoings, both relating to the partnership business and the estates, were drawn and paid out of that account without distinction; that each of the brothers drew from this joint account the moneys which he required for his own personal requirements; that neither brother had a separate banking account; that in an account book (which had been kept by the two brothers some time before the father's death, and from which it appeared that they had been in the habit of keeping their money matters in common) at the date of the father's death a fresh heading was put to the account, being on one side, "*J. & S. W.*, rents received," and on the other side, "Repairs, &c., paid," which book was kept till 1840; that Messrs. *Rippingham & Rose*, the solicitors who had for many years received the rents of the estates, after paying outgoings, accounted for them to the two

brothers jointly; that on one occasion the fine and charges on the admittance of *Samuel* as heir, according to the custom of borough English, were, with the knowledge of the Defendant *John* of the fact, paid out of the common fund; that all the leases were granted by the two brothers jointly, and that one lease which had been originally engrossed as a lease from the Defendant *John* alone had been altered by the interlineation of the brother *Samuel* as co-lessor; that the policies of insurance against fire were effected in the joint names of the two brothers; that the two brothers were rated as co-owners in respect of landlord's property tax, and that both were registered as voters for *Middlesex* in respect of the *Lime Street* property; that with regard to repairs, they jointly employed and instructed the builders and workmen.

The widow lived in the same house with the two brothers till her death in 1837. She never enjoyed or asserted her legal rights in the real and personal property of her late husband; and there was evidence of a conversation in which she had stated that she did not mean to insist on her dower, because her son *John* intended to carry out his father's intentions with respect to the property.

The partnership having been dissolved in November, 1851, *John Williams*, in 1852, and again in 1853, filed bills in Chancery against his brother, claiming his rights in the real and personal estate of his father, but neither of these suits came to a hearing. In 1857, *Samuel Williams* filed two bills, but they were confined to the partition of the gavelkind estates of his father and grandfather respectively. *Samuel Williams* died in April, 1858, and the present suits were instituted by his executors and devisees in trust.

The Vice-Chancellor held that such a course of dealing had been proved as established the existence of a family arrangement which the Court could uphold, and declared the Plaintiffs entitled to the relief prayed. The Defendant appealed from this decree.

The appeal was heard before the Lords Justices in the months of April and May, 1866, but in consequence of the late Lord Justice, Sir *J. L. Knight Bruce*, having resigned his office before judgment had been delivered, the case was reheard before the Lord Chancellor and Lord Justice Sir *G. J. Turner*, by one counsel on each side.

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WILLIAMS v. WILLIAMS.

Sir *Roundell Palmer*, Q.C. (with whom were Mr. *Osborne*, Q.C., and Mr. *G. N. Colt*), for the Plaintiffs (1):—

There is distinct evidence of an agreement between the brothers to divide the property equally. It is no objection that the promise was not in writing, because it was acted upon for many years. There was sufficient consideration to support the agreement as a family arrangement. In such cases the Court does not look to the adequacy of the consideration, but to the motives which actuate the parties. The younger brother gave up his borough English estate, and the widow gave up her dower and her share in her husband's personalty; and there is evidence that she did so with an express view to this arrangement. *Ford* v. *Stuart* (2); *Gregory* v. *Mighell* (3); *Mundy* v. *Jolliffe* (4); *Stapilton* v. *Stapilton* (5); *Stockley* v. *Stockley* (6); *Persse* v. *Persse* (7); *Hammersley* v. *Baron de Biel* (8); *Maunsell* v. *White* (9).

The Defendant contends that the agreement, if it existed at all, was only to carry out the father's intended will, and consequently applied to no property to which he was not entitled at the date of that instrument; but the whole course of conduct of the parties shews that they had no such technical intention, but that all their father's property was to be brought into the partnership, and that they were to enjoy it equally as tenants in common.

The *Attorney-General* (Sir *John Rolt*) (with whom were Mr. *Baily*, Q.C., and Mr. *Berkeley*), for the Appellant, *John Williams*:—

There was no agreement to divide the property. At the utmost there was an expression of intention to do so on the part of *John Williams*. The Court will not enforce such an intention: *Jorden* v. *Money* (10). Part performance will take an agreement out of the operation of the *Statute of Frauds*, but it must first be proved that there was an agreement. Nor was there any consideration for the

(1) On the case being opened by the Plaintiff's counsel, the Lord Chancellor said, that he had determined, in concurrence with the Lords Justices, that in future hearings of appeals the Appellant should in all cases begin. See Law Rep. 2 Ch. 15. 12 Jur. N.S. 994.

(2) 15 Beav. 493.

(3) 18 Ves. 328.

(4) 5 My. & Cr. 167.

(5) 1 Atk. 2.

(6) 1 V. & B. 23.

(7) 7 Cl. & F. 279.

(8) 12 Ibid. 45.

(9) 4 H. L. C. 1039.

(10) 5 Ibid. 185.

agreement alleged by the Plaintiffs. As to part of the property, the two brothers were jointly entitled; and as to other parts, they probably were ignorant of their just rights. Their mode of keeping their banking account may have been adopted for the convenience of the partnership business. It is said that the widow gave consideration by giving up her dower and share of the personal property of her husband; but she did not bind herself to give up her rights: she could have withdrawn from the arrangement at any time, and it could not have been enforced against her. The Plaintiffs contend that it was a family arrangement, but it has not the ingredients of family arrangements which have been enforced by this Court. There was no mutuality in it, there were no disputed rights, no compromise of family differences: *Neale* v. *Neale* (1). If there was any agreement it could only have related to the property which would have passed under the father's will if it had been valid, and, therefore, would not include such parts of the real estate as were purchased after the date of the will, nor the moiety of the grandfather's property in which *James Williams* has a life interest. According to the true construction of the grandfather's will that moiety never formed part of the father's estate, but descended to the Appellant as his grandfather's heir-at-law.

The Plaintiffs are barred by the laches of their testator. The points now in question were raised in 1852, but *Samuel Williams* never asserted his rights.

Sir *R. Palmer*, in reply.

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Jan. 26. LORD CHELMSFORD, L.C., after stating the facts continued:—

It is distinctly proved that after the unwitnessed paper was refused to be admitted to probate the Appellant declared that the invalidity of the document as a will should make no difference whatever between himself and his brother, and on several occasions he said that all his father's freehold property should be "not mine

(1) 1 Keen, 672.

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or thine, but ours." This declaration the Appellant followed to the letter, and adhered to down to the 6th of November, 1851; but he now insists that all which he so long acquiesced in was wholly dependent upon his pleasure for its continuance.

Did, then, the declaration of the Appellant, adopted as it was by his brother, and acted upon by both of them, constitute a binding agreement between them?

So far as the motives which led the Appellant to admit his brother to an equal share of their father's property are concerned, this case differs from those cases of family arrangement which have formerly been the subject of decision. There was here no doubtful right to be compromised, no dispute between the brothers which was to be set at rest, no honour of the family involved; the Appellant was merely prompted by respect for his father's intentions and by his affection for his brother, both most excellent and praiseworthy motives, but scarcely sufficient to constitute such a consideration as would convert an act of kindness into a binding engagement. If, therefore, there had been no consideration for the Appellant's promise to share the freehold property with his brother, I should have been disposed to hold that he could not be bound by it. But it appears to me that there is quite sufficient consideration to prevent its being a mere voluntary agreement, and that the Court will not be disposed to scan with much nicety the amount of the consideration. The borough English property, which belonged to *Samuel*, was of some, though of trifling value, and was brought by him into the common stock; and in a case of this kind some consideration may perhaps be found in the fact of *Samuel* leaving his share of the stock in trade in the business and continuing to carry it on instead of breaking up the concern. But there can be no doubt that the widow was a party to the whole arrangement, and the consideration moving from her must be taken into account. It is admitted by the Appellant, in his answer, that his mother "lived for several years after the decease of his father, and that she was maintained and supported by himself and his brother out of the proceeds of their joint business, and out of the income of their father's estate, and that she never made any exclusive claim to any real or personal estate or any interest in real or personal estate to which she became entitled on the death

of their father." From the language of this admission I understand that the mother allowed her interests in the real and personal property to be considered as part of the joint property which her sons were together using and enjoying. One of the witnesses speaks to a conversation which she heard shortly after the death of *John Williams*, the father, in which *James Williams*, his surviving brother, asked the widow "what she meant to do about her right of dower, and whether she meant to insist upon it?" to which she answered that she did not intend to do so, as her son *John Williams* had assured her that he meant to carry out his father's intentions, and that there would be but one purse between him and his brother *Samuel*." It was objected that this was not evidence, but it appears to me that the objection is not well founded. The statement proved was of a declaration by a deceased person against her interest. Suppose, after the widow and the brother had been living together for years in the manner described in the answer, evidently with the object of carrying out the father's intentions, and the widow had then claimed her dower and thirds in the property, could she not have been restrained by a Court of equity? It seems to me that if valuable consideration is required in this case to make the family arrangement binding, it is sufficiently provided by the widow agreeing to become a party to it, and relinquishing her rights for the purpose of carrying it out.

A point has occurred to me in considering the case which was not mentioned in argument, but upon which I cannot help thinking the Plaintiffs' right to a moiety of the freehold property of *John Williams*, the father, might be maintained, even at law. As far as can be collected from the evidence, immediately on the death of the father, *Samuel* was permitted to enjoy the real estate in common with his brother, the Appellant. Whether he is to be regarded as a tenant in common, or a joint tenant, his possession continued uninterruptedly for more than twenty years before any suit was instituted. The notice of dissolution, on the 6th of November, 1851, was no disturbance of this possession, and under the 3 & 4 Will. 4, c. 27, *Samuel* had acquired a right which would have been available at law against the Appellant. If this is so, the question of whether there was a binding agreement becomes immaterial.

[His Lordship then referred to the arguments on the part of the

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Appellant based upon the answer of *Samuel Williams* in the suit of 1851, and on some parts of the evidence as to the course of dealing between the brothers. His Lordship also said that he considered that there was no ground for the contention of the Appellant that the agreement, if it existed at all, was confined to the real estate of the father at the date of his intended will. He was of opinion that it extended to the whole of the real and personal estate to which the father was entitled at his death. His Lordship continued:—]

The Appellant lastly says, that, admitting the existence of the agreement to the fullest extent contended for by the Plaintiffs, they are not entitled to *Samuel's* moiety of the freehold, as it was held in joint tenancy, and the whole now belongs to him by survivorship. There is no foundation for this argument. There is nothing to shew, either by reference to the intended will, or by the Appellant's declaration, that he could have had any intention, one way or the other, as to the nature of the joint right to the property. There is, therefore, no other guide for the judgment of the Court than the mere fact of the manner in which the property was dealt with. Now this is just as consistent with a tenancy in common as with a joint tenancy. But as equity always bears against a joint tenancy, and as the facts in this case are equally favourable to the existence of a tenancy in common, there can be no doubt that the Court ought to infer from the facts this tenancy rather than the other.

There was a question incidentally raised, and argued at some length, as to the meaning of the term "survivor" in the grandfather's will,—whether it meant "either" of his sons, or "the one surviving." From the view which I have taken of this case, it is not necessary for me to consider this question, but I mention it to shew that it has not been overlooked.

The decree of the Vice-Chancellor must be affirmed, and the Petition of appeal dismissed with costs.

SIR G. J. TURNER, L.J., after discussing the facts, continued:—

It was first argued on the part of the Appellant in support of this appeal, that there was nothing amounting to an agreement between the Appellant and his brother *Samuel;* that there was no

more than an intention on the part of the Appellant, or, at the most, a promise on his part, to divide equally with *Samuel* some part of the property in question, and that this intention or promise could only be binding in so far as it was carried into effect. What is stated by the witness *Smitheman* to have passed at the interview between the parties, shortly after the probate of the father's will had been refused, was relied on to support this view of the case. It was urged that the Appellant then went no further than to declare that the invalidity of the instrument purporting to be the will of the father should make no difference between him and *Samuel*. But what was then said by the Appellant had reference, clearly, to the whole of the property of the father, and not merely to that part of the father's property to which the Appellant was himself entitled; and the whole property of the father could not be dealt with upon the footing of the instrument being valid without the concurrence of *Samuel*, who was himself entitled not only to the borough English estate, but to his share in the personal estate. What passed at this interview, therefore, cannot, I think, be considered otherwise than as a proposal by the Appellant to *Samuel* for an equal division between them of the property to which the proposal extended, and if that proposal was accepted by *Samuel*, this alone would, as I apprehend, be sufficient to constitute an agreement between them; for no more can be necessary to constitute an agreement than that an offer should be made and accepted. It was said, however, that *Samuel* said nothing on that occasion in acceptance of the Appellant's offer, but the acceptance of an offer may be shewn either by words or by acts, and, looking to the subsequent dealings and conduct of these parties, there cannot, I think, be the least doubt, that *Samuel* accepted the offer. If, therefore, the case rested only on what passed at this interview, I should think there was sufficient proof of an agreement having been come to between the parties, but, independently of this, the facts seem to me to be quite inexplicable on any other footing than of there having been an agreement between them. The mode in which the rents were dealt with might, perhaps, have admitted of explanation, though the Appellant's explanation, that they were so dealt with in order to increase the capital of the partnership, is plainly wrong, as they were not, for many years,

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carried to the account of the partnership at all; but what can account for the leases of the socage property, the description of the property as belonging to the brothers, and their being registered as voters in respect of that property, unless there was an agreement between them? These leases were prepared by the solicitors of the parties, and it cannot be supposed that *Samuel* would have been joined as lessor, or would have been made a covenanting party in them, unless he had an interest in the property, which he could only have by agreement with the Appellant. I am satisfied, therefore, that the Vice-Chancellor has properly dealt with this case upon the footing of there having been an agreement between the parties.

But then it was argued for the Appellant, that assuming that there was an agreement between the parties, this Court would not enforce the agreement, and several points were relied upon in support of this contention:—1st. The want of mutuality; 2nd. The want of consideration; and 3rd. The *Statute of Frauds*.

But I can see no want of mutuality in the agreement, for if binding on the one side, it would of course be binding on the other side also. Nor do I think there was any want of consideration. The Vice-Chancellor has, and I think correctly, rested this part of the case upon the footing of the cases as to family arrangements. It was strongly argued for the Appellant that this case does not fall within the range of those authorities; that those cases extend no further than to arrangements for the settlement of doubtful or disputed rights, and that in this case there was not, and could not be, any doubtful or disputed right; but this, I think, is a very short-sighted view of the cases as to family arrangements. They extend, as I apprehend, much farther than is contended for on the part of the Appellant, and apply, as I conceive, not merely to cases in which arrangements are made between members of a family for the preservation of its peace, but to cases in which arrangements are made between them for the preservation of its property. The re-settlement of family estates, upon an arrangement between the father and the eldest son on his attaining twenty-one, may well be considered as a branch of these cases, and certainly this Court does not in such cases inquire into the *quantum* of consideration. Here the agreement which was made could not be carried into effect

without the concurrence of the Appellant and *Samuel*, nor could it be carried into effect without the concurrence of the widow also; for, to say nothing of any right of dower or freebench which she may have had, she had an undoubted right to one third of the personal estate, and might have enforced the realization and division of it, and if she had done so, the agreement could not have been made effectual.

It was said, on the part of the Appellant, that there is no proof of the widow having concurred in the arrangement, and that she was not bound by it; but without entering into the question which was raised at the bar as to the admissibility of *Ann Bailey's* evidence (as to which, however, I am by no means satisfied that it is not admissible against the Appellant as claiming under her), there cannot, I think, be the least doubt that she knew of the arrangement; and as she lived for six years without in any way calling it in question, she must, I think, be taken to have concurred in it; at all events, to the extent that she had determined not to question it. Nobody claiming under her could be heard to dispute what she did not intend to question, and the agreement, therefore, would be binding on her estate.

There remains, then, on this part of the case only the question upon the *Statute of Frauds*, as to which it is sufficient to say that the agreement has been too far acted upon for the Court to permit the statute to be set up.

His Lordship then proceeded to consider the question as to the extent of the agreement, and expressed his opinion that it was intended by the parties to extend to the whole of the real estate of the father at the time of his death. With respect also to the moiety of the grandfather's freehold estate, which was enjoyed by *James Williams* during his life, his Lordship said that, although he was inclined to think that upon the true construction of the grandfather's will the moiety of *James Williams* became part of the estate of *John Williams*, the father, yet he agreed with the Lord Chancellor, that it was not necessary to decide the question, because the income of these estates had been for many years dealt with by the brothers in the same way as the rest of the property, which was sufficient to shew that it was intended to be included in the agreement.

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His Lordship was also of opinion that the fact of the income of the property having been for so many years carried to the account of the partnership, in which there could be no survivorship, was conclusive against the supposition that the brothers intended to hold as joint tenants; and that there was nothing in the conduct of *Samuel Williams*, in refraining from asserting his title by litigation in his lifetime, or in the admissions in his answers in the previous suits, which could prejudice the Plaintiffs in the present suit. It was not, he thought, incumbent upon *Samuel Williams* actively to assert his title while another suit was pending in which the question of title was in litigation. He was therefore of opinion that the decree of the Vice-Chancellor was right, and that the appeal ought to be dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Paine & Layton.*
Solicitors for the Defendant: Messrs. *Kingsford & Dorman.*

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Copyright—Trade Mark—Right to use Title of Book—5 & 6 Vict. c. 45.

H., in 1863, registered an intended new magazine, to be called "*Belgravia.*" In 1866, such magazine not having appeared, *M.*, in ignorance of what *H.* had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September, as about to appear in October. *H.*, knowing of this, made hasty preparations for bringing out his own magazine before that of *M.* could appear, and in the meantime accepted an order from *M.* for advertising *M.*'s magazine on the covers of his own publications, and the first day on which he informed *M.* that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of *H.*'s magazine appeared. *M.*'s magazine appeared in October:—

Held, on bill filed by *M.* (affirming the decision of *Stuart*, V.C.), that *M.*'s advertisements and expenditure did not give him any exclusive right to the use of the name "*Belgravia*," and that he could not restrain *H.* from publishing a magazine under the same name, the first number of which appeared before *M.* had published his:

Held, on bill filed by *H.*, that *H.*'s registering the title of an intended publication could not give him a copyright in that name, and that, in the circumstances of the case, he had not acquired any right to restrain *M.* from using the name, as being *H.*'s trade mark.

IN 1863, Messrs. *Hogg* conceived the idea of publishing a monthly magazine to be called "*Belgravia*," and on the 12th of October in that year registered it at *Stationers' Hall* under the name of "*Belgravia:* A Magazine of Fashion and Amusement," entering, under the head of "date of first publication," the date, 12th of October, 1863.

In 1866, Mr. *Maxwell*, in ignorance of any such magazine having been projected by Messrs. *Hogg*, determined to bring out a monthly magazine called "*Belgravia.*" He registered it at *Stationers' Hall* on the 11th of June, 1866, entering that day as the date of first publication, and made arrangements with Miss *Braddon* to undertake the duties of editor. He also arranged with authors to supply contributions, and made all requisite preparations for bringing out the first number at the beginning of October. From about the end of July to the latter part of September, the

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projected magazine was extensively advertised, at considerable expense.

On the 24th of September, 1866, the Messrs. *Hogg*, for the first time, advertised a monthly magazine called "*Belgravia*," to be published by them, and brought out the first number on the following day. It was not disputed that they knew of Mr. *Maxwell's* projected publication early in August, and brought out their own in great haste in order to prevent his obtaining priority in time of publication.

On the 19th of September, 1866, and again on the next day, Mr. *Johnson*, a collector of advertisements for Messrs. *Hogg*, called on Mr. *Maxwell* to solicit from him an order for an advertisement of "*Belgravia*," and Mr. *Maxwell*, on the latter day, agreed with him for the insertion of an advertisement of the work in two periodicals published by Messrs. *Hogg*, and signed an order as follows:—

"*Belgravia*: A *London* magazine, conducted by *M. E. Braddon*, author of *Lady Audley's Secret*. Office: *Warwick House, Paternoster Row, London*."

"Please to insert '*Belgravia*' advertisement on back of contents for October, and on cover, p. 2, for November *London Society*, and as a page in *Churchman's Family Magazine*, for £20. The sum of £12 to be allowed if the advertisement cannot appear on cover, p. 2, of November *London Society*."

Within an hour after this order had been taken away by Mr. *Johnson* he returned, and stated that Messrs. *Hogg* considered the price too low, and would not insert the advertisements under £25. Mr. *Maxwell* insisted on his right to have them inserted at the charge which had been agreed upon, and on the same day wrote a letter to Messrs. *Hogg* to that effect. On the following day (the 21st) a proof of the advertisement was sent him, which he revised and returned. On the 24th he wrote to Messrs. *Hogg* thanking them for having attended to his communication and sent him the proof. On the same day the magazine of Messrs. *Hogg* was advertised in an evening paper, and on the 25th, the day of its publication, they wrote to Mr. *Maxwell* as follows:—

"Sir,—With reference to your note, dated September 24th, and received by us to-day, we beg to inform you that the advertisement

concerning '*Belgravia*' and Miss *Braddon's* novels, which was given by you to Mr. *Johnson*, the advertising collector for *London Society* and *The Churchman's Family Magazine*, is objectionable to us, so far as it relates to '*Belgravia*,' which is a title you are not at liberty to use.

"In 1863 we projected a magazine so entitled, and duly registered it, and we have just produced the first number. No one, therefore, must interfere with our property in that work.

"Mr. *Johnson*, the advertising collector, entered into a contract with you, we find, for two months. The October insertions he has passed (being ignorant of all but his own immediate business in connection with the two sheets he makes up), but we have informed him of our objection to insert in future any advertisement such as we have referred to. We also take the earliest opportunity of writing you on the subject, so soon as the completion of our legal *status* gives us right to do so, in order that we may give you an opportunity, by stating our objection, both to withdraw the order you have given Mr. *Johnson* for November, and in all other respects save you from spending money in advertising, by thus giving you full information as to the facts concerning the copyright. We have also this day given Messrs. *Ward, Lock, & Tyler*, due notice that they are not at liberty to interfere with the title of our magazine property '*Belgravia*.'"

Mr. *Maxwell* filed his bill on the 26th of September to restrain the Messrs. *Hogg* from selling, issuing, publishing, advertising for sale, or allowing to be sold, any magazine or other periodical under the title of "*Belgravia*," and from continuing to sell or advertise for sale any copies of the September number.

On the 5th of October Messrs. *Hogg* filed a similar bill against Mr. *Maxwell*, to restrain him from continuing the publication of his magazine.

Vice-Chancellor *Stuart* having refused Mr. *Maxwell's* motion for an injunction, Mr. *Maxwell* appealed, and by arrangement both causes now came on before their Lordships as on motion for decree

Mr. *Dickinson*, Q.C., and Mr. *Swanston*, for Mr. *Maxwell*, in *Maxwell* v. *Hogg*:—

There is no copyright here under 5 & 6 Vict. c. 45. Mr. *Maxwell*

W. N. 1867. 329: 12 Jur. N. S. 916.

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was under the same mistake as Messrs. *Hogg*, and supposed that he could obtain copyright in a name by registering it, but there is nothing in the Act to give it: sects. 11, 13, 19. We rely on the principle of trade marks. We had not, indeed, published a work under the name "*Belgravia*," but we had extensively made known our intention to do so, and the public will be misled into purchasing the Defendant's publication, supposing it to be ours. Suppose *Rodgers & Sons*, having a great name for cutlery, were to advertise a razor under a fancy name, and somebody forestalled them by bringing out a razor with the same name, would not the Court restrain him? He would be passing off his goods as theirs.

[The LORD JUSTICE CAIRNS:—Is it not now settled that the right to trade marks is a question of property?]

Hall v. *Barrows* (1); *Leather Cloth Company* v. *American Leather Cloth Company* (2); *Millington* v. *Fox* (3); *M'Andrew* v. *Bassett* (4); *Seixo* v. *Provezende* (5), shew, as we submit, that we have a right to restrain a person from deceiving the public by passing off his goods as ours, to our pecuniary injury. *Lawson* v. *Bank of London* (6) contains nothing to impeach this principle. The observations of Lord *Langdale*, in *Clark* v. *Freeman* (7), are in our favour; it is clear that if Sir *J. Clark* had been ready to bring out pills of his own, Lord *Langdale* would have granted the injunction.

[The LORD JUSTICE CAIRNS:—It always appeared to me that *Clark* v. *Freeman* might have been decided in favour of the Plaintiff, on the ground that he had a property in his own name; but, according to your argument, if the novel of "*Woodstock*, by the author of *Waverley*," had been advertised extensively a year prior to its publication, Sir *Walter Scott*, or his publisher, might have filed a bill to restrain any one else from publishing during the year a novel under the same name.]

If a right of property be requisite, the expenses which we have

(1) 9 Jur. (N.S.) 483; 11 W. R. 525; 10 Jur. (N.S.) 55; 12 W. R. 322.
(2) 11 H. L. C. 523.
(3) 3 My. & Cr. 338.
(4) 10 Law T. (N.S.) 445; 12 W. R. 777; 10 Jur. (N.S.) 550.
(5) Law Rep. 1 Ch. 192.
(6) 18 C. B. 84.
(7) 11 Beav. 112.

incurred in advertising, and in making preparations for the intended work, create such a right.

Mr. *Greene*, Q.C., and Mr. *W. Morris*, for Messrs. *Hogg*, were not called upon.

SIR G. J. TURNER, L.J.:—

This case being, as it is admitted, altogether new, must be considered upon principle. The first principle which applies, not only to this case, but to every case in this Court, is, that the Plaintiff must shew some property, right, or interest, in the subject matter of his complaint. The question, then, in that point of view is, whether the expenditure made by Mr. *Maxwell* upon his intended work of "*Belgravia*," and the advertisements issued by him from July to October, have created any such right of property in him as to entitle him to an injunction restraining another person from using the same title.

I will consider this question, first, with reference to the expenditure, and then with reference to the advertisements. That expenditure upon a work not given to the world can create, as against the world, an exclusive right to carry on a work of this nature, seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? Such an advertisement is nothing more than an announcement of an intention on the part of the Plaintiff to publish in the month of October following a work under a given title. Can that be considered as constituting in him an equitable title, or any title, to the name under which that work is to be published? If it is to be considered as doing so, the consequence will be that, without having made any new publication at all, he might come to this Court saying: "I have advertised my intention to publish in October a given work under a given title, and nobody else shall publish a work under that title until I have had an opportunity of bringing my work before the public." He does not by his advertisements come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a

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title, would be that, without having given any undertaking or done anything in favour of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do.

Another view of this case is, that enormous inconvenience would arise from entertaining a bill of this description. When we are dealing with a question so entirely new as the present question is admitted to be, we cannot dispose of the case without considering the conveniences and inconveniences which would result from the course which we are asked to take. If we are to entertain this bill, either upon the ground of expenditure, or upon the ground of publicity given by advertisement, the question must necessarily arise in every case, what amount of expenditure, and what degree of publicity, will be sufficient to create the equity? It has been argued that there is no distinction between the case of a title acquired, as the Plaintiff asserts that this title is acquired, by advertisement, and a title acquired by actual publication, and that if there had been a publication of this work by the Plaintiff under the title of "*Belgravia*," there would have been an undoubted case for coming to this Court to restrain another person from using that same title. It seems to me, however, that there is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world; so that there is a total want of consideration for the right which he claims. If this bill were to be maintained, I am not sure that a man might not advertise his intention to carry on business after a particular day under the name of a firm which had existed before, and which name might be of the greatest value, and then come into this Court to restrain any other person from using that name.

Looking, therefore, to the consequences that would result from entertaining this bill, and looking to the absence of any positive authority upon the subject, and looking also to the decisions of the

Courts of law, and to the case of *Hall* v. *Barrows* (1), and other cases in equity upon the subject, it seems to me that there is no principle, and no authority, on which this bill can be maintained.

In the case of *Lawson* v. *Bank of London* (2), the Judges seem to have foreseen the difficulties which would arise, and to have announced distinctly their opinion against the existence of any such right as this. In that case Mr. Justice *Willes* says, "No action could, I apprehend, be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forward to the world by the party complaining of the misuser of it." What applies to the case of trade marks upon goods, will, as it seems to me, equally well apply to the present case. My opinion, therefore, is, that this bill must be dismissed.

SIR H. M. CAIRNS, L.J.:—

I think that we must altogether eliminate out of this case an ingredient which it has been attempted to introduce into it—the ingredient, namely, of previous reputation acquired by the party advertising. In this case the previous reputation is not alleged to be so much that of the Plaintiff, as of the lady who was to edit the magazine; but, assuming the reputation to be that of the Plaintiff, I still think that this ingredient must be eliminated, because the Court has no means of judging, and has never been in the habit of taking upon itself to judge, upon a question of reputation. We have no test which we can apply to a question of that kind. The protection, if it exists, must exist in favour just as much of a trader who cannot allege that he has acquired any reputation in his trade, as of a trader who can make that allegation. I think, also, that this case cannot be decided on the ground of the loss which may be sustained by the Plaintiff in consequence of his being anticipated in his design of publishing under this name. It is very probable that such a loss may be sustained, but the first question to be determined is, is there a right, or is there property, on the part of the Plaintiff to be protected? for if there is only loss sustained, without there being a right of property to be pro-

(1) 9 Jur. (N. S.) 483; 11 W. R. 525; 10 Jur. (N. S.) 55; 12 W. R. 322.
(2) 18 C. B. 84.

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tected, this Court cannot interfere; and, finally, I think we must leave out of the case any observations which may possibly have to be made with regard to the conduct of the Defendant. The right of the Plaintiff must stand upon his own title, and not upon any act of the Defendant. The question then reduces itself to this, can property, of that character which is had in a trade mark, be acquired in a name, before the vendible articles bearing the name have actually been put upon the market for the purpose of sale? It is admitted that the case is a new one, and that there is no authority precisely in point, but it must be admitted that the *dicta* in equity are opposed to the view that such a bill as this can be maintained; and the case of *Lawson* v. *Bank of London* (1), and all the definitions which have been given in this Court of the nature of the right to protection in the case of trade marks, seem to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the articles to which the name is to be attached.

The definition given by Lord *Westbury* in *M'Andrew* v. *Bassett* (2), seems to be on this question precisely in point. Speaking of the argument which had been adduced before him in that case, that the *Anatolia Liquorice* was a word common to all, and that there could be no property in it, Lord *Westbury* said: "Property in the word, for all purposes, cannot exist, but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public." It is quite clear that, according to this definition, a property in the word could not be acquired until the vendible article was put upon the market; and again, in speaking of the three essential qualities which should be found in any case, in order that it might obtain the protection of this Court, Lord *Westbury*, in another part of his judgment, mentions this as a second ingredient: "That the article so marked is actually a vendible article in the market;" that is to say, in the market at the time protection is asked for, and at the time the right to that protection is said to

(1) 18 C. B. 84.

(2) 10 L. T. (N.S.) 445. 10 Jur. N.S. 55
4 De G. J. S. 380

have accrued. So far, therefore, as the definitions in that judgment go, they are entirely opposed to the Plaintiff.

Now, let us consider how the Plaintiff's right could be acquired. He says it was acquired either by advertisement, or by expenditure of money, or by both combined. What is the advertisement? No doubt the advertising was very extensive, and made at considerable expense, but the advertisement, as I read it, is nothing more than an announcement that the Plaintiff will at a future period offer for sale a certain article by a particular name; or, in other words (connecting the subject with the decisions as to trade marks), that he will endeavour at a future time to acquire property in this name by the process by which property in a name for this purpose is acquired according to the doctrine of the Court.

Then, with regard to the expenditure, it seems to me that the argument rests upon a fallacy. Mr. *Swanston* said, and very truly, that by the expenditure of money the Plaintiff creates property in the articles. It is true that money was expended in purchasing paper, in printing, and in paying authors for articles afterwards printed on paper which was to constitute this magazine. All this was done at the time the bill was filed; and property had been acquired—but acquired in what? Acquired in the labels, in the paper, in the copyright of those articles which were purchased; but not acquired, if the decisions of this Court are right, in the name or style "*Belgravia*," because, according to those decisions, no property could be acquired, except through the process of sale, or offering for sale, in the market. It is quite obvious that, consistently with this advertisement, consistently with this expenditure, the Plaintiff might at any time before such publication have changed his mind; he might have delayed publication; he might, on the other hand, finding there was no sale, have withdrawn the article altogether from the market, thereby leaving it open to any other person to adopt the name. Any one of these contingencies might have occurred, and yet the Court is asked to protect the Plaintiff in the exclusive use of this name before it is known whether any of these events will occur or will not occur. I am prepared to hold, without any hesitation, that the mere intention, and the declaration of intention, to use a name will not create any property in that name, and to hold also that there can be no

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protection in this Court for the intended name during the course of manufacture of the article which is to bear that name.

Upon these grounds, I think that this bill is misconceived, and that it must be dismissed.

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Mr. *Greene*, Q.C., and Mr. *W. Morris*, for Messrs. *Hogg*, in the suit of *Hogg* v. *Maxwell*:—

Messrs. *Hogg* registered the title "*Belgravia*" in October, 1863. If that gave a copyright there has been nothing to displace it. If it did not, we submit that the registration, combined with priority of publication, gave a right to the name as a trade mark. As to the first point, we contend that a copyright was acquired. By 5 & 6 Vict. c. 45, ss. 2 and 13, copyright is obtained by registration in every "part" of a book. Everything original in the book is thus made copyright, even to the title page, which is as much a part of the book as anything else. Another person can no more pirate the title page than a page out of the middle of the book. The 14th section of the Act enables any person who is aggrieved by our registration to get rid of it if we have no title. Messrs. *Hogg* acted fairly. They searched the register, and, finding that there was no similar name registered, they registered it. *Maxwell* made no search, but registered the name without any inquiry as to the existence of a prior right. As to the second point, we registered the name first, and first published under it. This gives us a right to it as a trade mark, a long user not being necessary for that purpose. This is not what it appears at first sight, the case of one tradesman snapping up another tradesman's intended trade mark. We registered the name, as *Maxwell*, had he exercised reasonable diligence, would have known; and we did so with a *bonâ fide* intention of using it, which had never been abandoned, though circumstances delayed the carrying that intention into effect.

[THE LORD JUSTICE CAIRNS:—Would it not have been more fair and tradesmanlike to inform Mr. *Maxwell*, when he began to advertise, that he was proposing to use a name which belonged to you?]

Messrs. *Hogg*, as they depose, fully believed that they could not have any legal right to the name until they had used it; and it would have been suicidal to give *Maxwell* information which would have enabled him to publish first.

Mr. *Dickinson*, Q.C., was then heard only on the question of the costs of *Maxwell* v. *Hogg*.

SIR H. M. CAIRNS, L.J.:—

Messrs. *Hogg*, the Plaintiffs in this suit, rest their claim to an injunction upon two grounds. First, that they have a right, by way of copyright, to the word "*Belgravia*" as a title of a magazine; and secondly, that it has become, by sale in the market of their goods, a species of trade mark, and entitled to the protection of this Court.

Now, first, as to the claim of copyright. The question that naturally presents itself is, assuming that there could be copyright in the word "*Belgravia*," when was the copyright acquired? Only two periods can be suggested: one, the period of the date of entry, on the 12th of October, 1863; and the other the time of publication, on the 25th of September, 1866, taken in connection with that previous entry. First, as to the date of entry, the 12th of October, 1863. The copyright under the Act is a right of "printing, or otherwise multiplying copies of," any "volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published." And then it is said that the word "*Belgravia*," being used upon the title page of the magazine, was part of a volume. But at the time of making the entry in the register at *Stationers' Hall* there was no volume, no part of a volume, no sheet, no separate fraction of a publication of any kind or description. There was nothing in existence except that very entry itself, and the entry of the name of a future publication. It is quite absurd to suppose that the Legislature, in providing for the registration of that which was to be the *indicium* of something outside the registry, in the shape of a volume or part of a volume, meant that, by the registration of one word, copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of

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a magazine. Then, as regards the time of publication, the 25th of September, 1866, could a title be acquired at that time to the word "*Belgravia*"? I think that it could not. In the first place, there had been the use of the term "*Belgravia*" in advertisements of every kind for two or three months previously; therefore the term "*Belgravia*" as the title of a magazine, was familiar to the public at that time, and no copyright could be claimed. I apprehend, indeed, that if it were necessary to decide the point, it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. The copyright contemplated by the Act must be not in a single word, but in some words in the shape of a volume, or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work. All arguments, therefore, for the purpose of maintaining this bill on the ground of copyright appear to me to fall to the ground.

I come then to the second argument, that turning upon the doctrine of trade marks. The case in this point of view is to be looked at merely with reference to what took place on and after the 25th of September, 1866, because, consistently with what we have already held in *Maxwell* v. *Hogg*, the declaration of an intention to use at a future period the term "*Belgravia*" as the title of a magazine, would not secure any protection as regards the use of that word as a trade mark. But on the 25th of September, 1866, a number of the magazine, with the title of "*Belgravia*," was published; and it has been assumed, and I think it appears sufficiently upon the evidence, that one or more copies of that magazine were sold on and after that day. The question is, whether by this exposure in the market, and sale on and after the 25th of September, 1866, Messrs. *Hogg* obtained a right, not merely to continue to publish a magazine bearing the name in question, but to prevent any other person publishing a magazine by that name?

The facts which appear to be material to that question are these: Messrs. *Hogg* state, in their cross-examination, that they knew early in the month of August that Mr. *Maxwell* was going to publish a magazine by the title of "*Belgravia*," and that large expenses were being incurred in advertising it. Messrs. *Hogg*

knew that they had at this time no title to the exclusive use of the word, because in other parts, both of their affidavits and of their cross-examination, their case is, that they hurried on the publication of their magazine under that name because they thought that without such publication they would have no title. They therefore were aware that they had no title.

With regard to the registration which they had made in October, 1863, I think the fair inference from the examination of Mr. *Hogg* is, that for all substantial purposes they had abandoned the idea of any publication of a magazine by the title of "*Belgravia*." Though possibly they may have thought the time might arrive when some use might be made of the name, there was, for all practical purposes, no intention whatever on their part of publishing, until they were put in motion by finding that Mr. *Maxwell* was about to bring out a magazine with that name. Then having, early in the month of August, ascertained what Mr. *Maxwell's* design was, and knowing that he was incurring large expenses, they made no communication whatever to him of any objection on their part to the use by him of the name "*Belgravia*." If the case stopped there, I think we perhaps should say that they only let Mr. *Maxwell* take his chance and pursue his own course, and that no fault could be found with their so doing. Messrs. *Hogg*, however, immediately upon ascertaining what Mr. *Maxwell* was doing, proceeded to bring out a magazine of their own, with the title "*Belgravia*," and so great was the expedition with which their preparations were made, that articles intended for other magazines of which they were the proprietors—articles which they had a right to devote to any purpose they pleased—were diverted from the magazines in which, in the natural course of things, they would have appeared, in order to make up, at the least possible expense, and in the shortest possible time, a magazine which might come into the world by way of anticipation of the intended and advertised magazine of Mr. *Maxwell*. There, again, I do not think that any fault could be found with Messrs. *Hogg*, if their only intention and design was to prevent Mr. *Maxwell's* occupying the ground so as to obtain an exclusive right to the use of the term "*Belgravia*." It is clear that if Mr. *Maxwell* had not been interfered with, and had been allowed to publish a magazine and to sell it for some time, he

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would have obtained, according to the doctrine of trade marks, a right to continue the exclusive use of that name, as indicating a monthly periodical. It might, therefore, well be, that Messrs. *Hogg* were justified in hurrying on for the purpose of anticipating Mr. *Maxwell*, because thereby they secured themselves against any case on his part to prevent their subsequently using the term "*Belgravia*." But I regret to say the matter does not quite stop there.

[His Lordship then stated the circumstances above-mentioned, relative to the advertisements of *Belgravia* on the two magazines published by Messrs. *Hogg*.]

Now, the question in that state of things is, not whether Messrs. *Hogg* are to be restrained from continuing the publication of their magazine, for that we have already decided they are not to be; but can they, who are led to this publication which they have made from the circumstance that they knew Mr. *Maxwell* was projecting a similar publication similarly named, and who abstained from informing him of any right, if right they thought they had, which they intended to assert against him, who communicated with him for a number of days at a most critical period of his work, leading him to believe, not merely that they had no objection to the publication, but that they would be willing to herald the publication of his work to the world — can they come forward after that, publishing a number of their own work, and say, "now we ask the Court of Chancery to hold that we, by placing this work of ours upon the market, and selling a certain number of copies of it, have obtained a trade mark in the use of this term '*Belgravia*,' and to restrain Mr. *Maxwell* from using the name?" In my opinion, undoubtedly they cannot. I think that the Court of Chancery, if it were to interfere in a case of that kind at Messrs. *Hogg*'s desire, would not merely be acting in contravention of all the principles upon which it has acted in cases of this kind, but would be countenancing that conduct, as to which I will use no harsher expression than this, that it seems to me far removed from the kind of fair and candid dealing which one would like to see prevailing between two commercial firms or two men of business.

In my opinion, the case of Messrs. *Hogg*, both as to copyright

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and as to trade mark, entirely fails; and I think their bill ought to be dismissed with costs; and I think, also, that we cannot import the conduct of Messrs. *Hogg* into the suit of *Maxwell* v. *Hogg*, for the purpose of absolving the Plaintiff in that suit from the payment of costs. But, in my opinion, the Plaintiff in that suit having also failed, we have no other course open to us but to dismiss his bill, and at the same time also his appeal motion which is before us for disposal, with costs also.

SIR G. J. TURNER, L.J.:—I entirely agree.

Solicitors for Mr. *Maxwell:* Messrs. *Linklaters, Hackwood, & Addison.*

Solicitors for Messrs. *Hogg:* Messrs. *Ashurst, Morris, & Co.*

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In re NORTH HALLENBEAGLE MINING COMPANY.

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Company—Winding-up—Contributory—Forfeiture of Shares.

The articles of association of a joint stock company provided that if a shareholder should fail in paying any call, the company might give him notice that in default of payment within a specified time, his shares would be forfeited; that if the requisitions of any such notice were not complied with, the shares might be forfeited by a resolution of the directors to that effect; that when any share had been so forfeited, notice of such forfeiture should be given to such shareholder, and an entry should be forthwith made in the register of shareholders, stating the date of such forfeiture; and that any share so forfeited should become the property of the company.

K., a shareholder in the company, made default in payment of his calls, and notice was sent to him in due form that, unless he paid the calls by the 2nd of September, they would be forfeited. The time having elapsed without payment, the secretary made entries in the books on the 3rd of September that the shares were forfeited, and had been transferred to the company. But there was no entry in the minutes of any resolution having been passed by the directors, nor any evidence of any notice of the forfeiture having been sent to *K*:—

Held (reversing the decision of the Vice-Warden of the Stannaries Court), that there was a valid forfeiture of the shares, and that *K.* could not be placed on the list of contributories as a member of the company.

As the entry of forfeiture on the books could not have been properly made

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without a resolution of the directors, the Court was bound to assume that such a resolution had been passed:

Held, also, that the forfeiture was complete on the 3rd of September, without sending a notice of it to the shareholders, the provision in the articles as to sending the notice being mandatory only, and not of the essence of the forfeiture.

THIS was an appeal from an order of the Vice-Warden of the Stannaries Court, made in the winding up of the *North Hallenbeagle Tin and Copper Mining Company, Limited*, whereby he had placed the name of Mr. *Richard Knight*, the Appellant, on the list of contributories as a present member of the company, in respect of 250 shares.

The Appellant admitted that he was formerly owner of these shares, but alleged that they had been forfeited, and transferred to the company before the winding-up.

The articles of association which related to the forfeiture of shares were the following:—

Art. 21. "If a shareholder fails to pay any call on the day appointed for payment thereof, the company may at any time thereafter, so long as the call remains unpaid, give a notice to such shareholder that, unless payment be made of such call, together with interest due thereon, within such time, not being less than twenty-eight days from the date of such notice, and at such place as the directors shall appoint, such shares shall be forfeited."

Art. 22. "If the requisitions of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may be forfeited by a resolution of the directors to that effect."

Art. 23. "When any share has been so declared to be forfeited, notice of such forfeiture shall be given to such shareholder, and an entry thereof shall forthwith be made in the register of shareholders, stating the date of such forfeiture."

Art. 24. "Any share so forfeited shall become the property of the company, and may be disposed of in such manner as the company may think fit."

A call of 2*s.* 6*d.* per share was made on the shareholders, and became payable on the 11th of April, 1863, which the Appellant failed to pay. On the 23rd of June, the secretary of the company

wrote to the Appellant warning him that, if the call was not paid by the 29th of June, a formal notice of forfeiture of the shares would be served on him.

On the 3rd of August, the secretary sent a formal notice to the Appellant calling upon him to pay the calls on his shares, amounting to £62 10*s.*, with interest, at the office of the company at *Leeds*, within thirty days, and stating that, "unless payment be made of such calls, together with interest due thereon, at such place and within the time aforesaid, such shares will become forfeited, and the directors will forthwith pass a resolution to that effect, whereupon such shares so forfeited will become the property of the company, and will be disposed of in such manner as the said company may think fit, and the said company will also commence an action at law against you for the money of the said calls, and interest."

The Appellant took no notice of this letter, and did not pay the call. The secretary accordingly made an entry in the book containing the list of shareholders against the name of the Appellant, as follows:—"Sept. 3, 1863.—Forfeited to the company, 250 shares." And he made a memorandum, of the same date, in the Register of New Shares, to the effect that the Appellant's shares were "transferred to the company."

There was, however, no entry in the minute book of the directors declaring the forfeiture of the shares, nor was there any evidence of any notice of such declaration having been sent to the Appellant, nor did the directors proceed to dispose of or deal with the shares.

Some meetings of the company took place after the 3rd of September, but no notices were sent to the Appellant, nor was he in any way treated as a shareholder.

Soon afterwards the company became embarrassed, and, on the 1st of December, a resolution was passed to wind up the company voluntarily. On the 27th of August, 1864, an order was made to continue the voluntary winding-up under the supervision of the Court, and on the 18th of September, a further order was made for a compulsory winding-up.

Lists of the contributories were made out, list A. containing the names of those who were present members of the company, and

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list B. of those who had ceased to be members, but were still liable to contribute. Mr. *Knight's* name had been at first placed on list B., but on the application of the Registrar of the Stannaries Court, acting as official liquidator, he was removed by the Vice-Warden to list A., on the ground that the shares had not been duly forfeited. From this order Mr. *Knight* appealed.

Mr. *Glasse*, Q.C., and Mr. *Lindley*, for the Appellant:—

The absence of any resolution of the directors declaring the shares forfeited is a mere matter of form: it is sufficient that the articles were complied with substantially. *Woollaston's Case* (1), in which case there was no declaration of forfeiture subsequently to the notice (2); *Webster's Case* (3). The company treated the shares as forfeited, and sent no notices to Mr. *Knight* of any subsequent meetings.

But if a formal resolution was needed, it may be presumed. The entries were made in the books by the officer of the company, and it is to be assumed that he acted rightfully: *Grady's Case* (4); *Lane's Case* (5).

Mr. *Baggallay*, Q.C., and Mr. *Rowcliffe*, for the registrar, acting as official liquidator:—

The clauses relating to forfeiture are of a penal character, and must be construed literally. If Mr. *Knight* had claimed to be still a shareholder, the company could not have resisted his claim without shewing that they had complied with the requisite formalities; and the construction of the articles must be the same in both cases: *Barton's Case* (6); *Bigg's Case* (7); *Moore* v. *Rawlins* (8).

The 48th article of the deed of association requires that the directors shall keep a minute book in which all resolutions and proceedings at their meetings are to be entered. Therefore, the Court cannot presume the existence of a resolution which does not appear in the minute book.

(1) 4 De G. & J. 437.
(2) See *Bigg's Case*, Law Rep. 1 Eq. 309, 313, *n.*
(3) 32 L. J. (Ch.) 135.
(4) 1 D. J. & S. 488.
(5) Ibid. 504.
(6) 4 De G. & J. 46.
(7) Law Rep. 1 Eq. 309.
(8) 6 C. B. (N. S.) 289.

The omission of the notice of forfeiture, prescribed by the 23rd article, is also fatal to the completeness of the forfeiture. Until a shareholder receives notice of the forfeiture, he has a right to come in and pay the calls.

Mr. *Glasse*, in reply:—

In *Barton's Case* (1), the directors had no power to forfeit the shares at all.

SIR G. J. TURNER, L.J., after stating the facts, continued:—

The first consideration which arises upon this case, seems to me to be, how the case stands upon the question, whether there was a resolution of the directors declaring the shares forfeited. What appears is, that these shares having become forfeitable on the 2nd of September, 1863, there is an entry on the 3rd of September, in the book of this company, which is called the New Share Book, of these 250 shares being transferred to the company on that day. There is another entry in another book, which is called the List of Shareholders, of these shares being forfeited to the company on the same 3rd of September, 1863. Now, the shares could not have been transferred to the company, and could not have been forfeited to the company, without a resolution of the directors being passed. The articles say nothing as to the terms in which that resolution should be passed, and the question is, whether, in that state of circumstances, the Court ought not to presume that there was a resolution duly passed by the directors that the shares should be forfeited. Every act which was done by the company was illegal on their part, unless a resolution had been passed by the directors to forfeit the shares. They had no right to enter the shares as transferred to the company, they had no right to enter the shares as forfeited to the company, unless a resolution had been passed for that purpose, and yet we find both the one act and the other entered in the books of the company. I think that that is quite sufficient to afford evidence that there was a resolution passed by the directors of the company to forfeit these shares.

That being so, the only remaining question is, whether the

(1) 4 De G. & J. 46.

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directors can say that these shares still remain the property of Mr. *Knight*, and are not the property of the company by virtue of the transfer, or by virtue of the forfeiture, because no notice was given to Mr. *Knight* of the forfeiture having been made. Now, as I understand the 22nd and 23rd articles, the forfeiture was complete by the effect of a resolution which I assume, and which I think the Court must assume, to have been passed on the 3rd of September; because by the 23rd article it is said, "Where any share has been so declared to be forfeited," and the notice which is given to the shareholders therefore assumes that the forfeiture has taken effect. Further, the 23rd article proceeds thus: "And an entry thereof shall be forthwith made in the register of shareholders, stating the date of such forfeiture," which can only be the date of the resolution which has created the forfeiture. It seems to me, therefore, that unless it can be made out that notice to the shareholders was essential, and was treated and meant to be essential, to the completion of the forfeiture, these shares had, on the 3rd of September, ceased to be the property of Mr. *R. Knight*, and he had ceased to be a member of the company.

Then, was this notice essential to the completion of the forfeiture? The 22nd and 23rd articles seem to me to shew it was not. It was a matter of form, and not of substance; and in saying that I also entertain very considerable doubt, whether the directors of this company, having treated the shares as forfeited (which they did by the entries in the books), it can be competent to them to say that the notice was essential to the creation of the forfeiture which they themselves had treated as created by the declaration already made. It does not appear that there was any further resolution come to by the company in respect of the notice, and I think, therefore, the notice must be considered as matter more of form than of substance, and that Mr. *R. Knight* cannot be retained in the list of contributories as a member of this company.

SIR H. M. CAIRNS, L.J.:—

If the forfeiture is a valid forfeiture, there is no doubt that the only list on which Mr. *Knight's* name can appear is the list settled as list B. It is very clear, I think, that there was a *bonâ fide* intention on the part of the company at the time when the original

notices were given to forfeit these shares, and I think it must be also assumed, from the entries we find in the books of the company, that it was the belief of all parties connected with the management of the affairs of the company, previous to the order for winding-up, that these shares had been actually forfeited, and were part of the assets and property of the company.

Now, two points are made on the part of the officer of the Court of the Stannaries who acts as the official liquidator, in order to shew that the forfeiture of these shares, even if made *de facto*, was invalid in point of law. First, it said that there was no resolution of the character by which alone a forfeiture could be created; and, secondly, that, even if there was such a resolution, there was not a proper notice given to the shareholder of the forfeiture, and that until such notice was given the forfeiture was incomplete.

Now, as to the resolution, it is to be observed that no form of resolution is in any way required by the articles, and the articles do not, so far as I can see, absolutely require that a resolution should even be put into writing. No doubt in prescribing for the directors the way in which they should manage their business, the 48th article naturally requires them to keep regular books and minutes of their resolutions, but nothing whatever in that article suggests that a resolution, if not put into writing and duly entered in the book, would be in any way invalid. It has also been held in a case which has often been mentioned, I mean *Woollaston's Case* (1), that a resolution of forfeiture would not be invalid in the eye of this Court if made prospectively—that is to say, before the actual day arrived at which there was a default in payment of the calls.

Now we start in this case with the fact that there was, in the belief of the company and of the directors, a clear and distinct notice, given antecedently, that if the call were not paid the shares would be forfeited. No doubt that notice says "will be forfeited by the passing of a resolution." But I refer to it not for the words of the notice so much as for the substance of it, namely, that it was there announced that there was a clear intention of forfeiting the shares if the calls were not paid. We have certainly very scanty evidence supplied to us of what took place at the time this notice ran out, namely, on the 2nd and 3rd of September. This, however, we

(1) 4 De G. & J. 437.

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have in two books of the company, books by which the company is concluded, the Share Register, and the List of Shareholders. In both of these we find regular entries, as of the 3rd of September, of a forfeiture of the shares of Mr. *Richard Knight*, and of the appropriation of these shares, which formerly were Mr. *Knight's*, as part of the property of the company. No explanation whatever is given of these entries so as to deprive them of their natural meaning, so as to prevent the natural conclusion which would follow in reading those entries. None of the directors of the company, none of the officers of the company, have been examined to shew that there was any error or want of authority in making out these entries. The conclusion is obvious. On the one hand, to have made these entries without authority would have been a gross breach of duty, or something much worse, on the part of the officers who made the entries. On the other hand, if they were made with authority, that authority would be in substance, if not in actual form, the expression of the resolution of the directors to forfeit the shares of Mr. *Knight* for non-payment of calls. I, therefore, think that, whatever objection there may be in form, there is none in substance, to the forfeiture of the shares on the ground of the mode in which the resolution of the directors to forfeit the shares is expressed.

Then, as to the notice of forfeiture. The 23rd clause provides that, "where any share has been so declared to be forfeited, notice of such forfeiture shall be given to such shareholder." The question seems to me to be this—Is that provision what I may term a mandatory or directory provision, the convenience of which is obvious; or is it a statement of something which is of the essence of the forfeiture, and without which a good forfeiture cannot take place? In the first place, the words I have read do not make the notice expressly of the essence of the forfeiture. They are merely, in form at all events, directory words. But, in the next place, there is this very remarkable circumstance, that the notice which is there to be given is spoken of as a notice of forfeiture which has actually taken place. Moreover, the forfeiture is clearly, on that clause, to date, not from the giving of any notice, but from a resolution of the directors declaring a forfeiture. Further than that, n time whatever is specified within which the notice is to be given,

although acts might be done consequent on the forfeiture, which might be done immediately after the forfeiture had taken place and the shares had been transferred to the company, because the shares are to be disposed of in any way that the directors may think fit. Further—and it is the only other observation I will make upon the clause—the second part of the clause, namely, that which prescribes that "an entry thereof shall forthwith be made in the registry of shareholders stating the date of such forfeiture," cannot be an expression of that which is of the essence of the forfeiture. I put it to Mr. *Rowcliffe*, and he very fairly answered the question, whether he could contend that if there was an omission to enter in the register the date of the forfeiture, that would invalidate the forfeiture. I do not think any one would venture to contend that. It would be strange, therefore, if one part of the clause, ushered in by the same set of words as the other, was something creating an essential ingredient in the forfeiture, whereas the other was merely mandatory or directory. These circumstances lead me to the conclusion that the clause which I have read is simply directory, and that neither the company, nor anybody representing the company, could set up as a bar to the validity of the forfeiture the circumstance that no notice had been given under this clause.

I think, therefore, that the name of Mr. *Knight* should be removed from list A., and placed in that list where it stood before, namely, list B.

Solicitor for the Appellant: Mr. *Flower.*

Solicitors for the Company: Messrs. *Gregory, Rowcliffes, & Rawle,* for Messrs. *Hodge, Hockin, & Marrack, Truro.*

L. JJ. 1867 Feb. 8.

In re HUTCHINSON.

Bankruptcy—Trust Deed—Registration—Affidavit—Bankruptcy Act, 1861, *s.* 192—*Order of* 22*nd May*, 1862.

A debtor, who had executed a trust deed, having refused to make the required affidavit, which was accordingly made by another person acquainted with the facts:—

Held, on an *ex parte* application by one of the trustees, that the Court had power to dispense with the General Order of the 22nd of May, 1862, which requires an affidavit by the debtor; and the deed was ordered to be registered.

THIS was an application made *ex parte* on behalf of one of the trustees of a deed which had been executed by Mr. *Frederick Hutchinson*, for the benefit of his creditors, for leave to register the deed under the 192nd section of the *Bankruptcy Act*, 1861 (1), the Registrar having objected to register it on account of the insufficiency of the affidavit.

The section referred to requires, that with the deed there shall be delivered to the Registrar an affidavit by the debtor *or some person able to depose thereto*, or a certificate by the trustees or trustee, that a majority in number, representing three-fourths in value, of the creditors whose debts amount to £10 or upwards, have assented to the deed, and also stating the amount in value of the property and credits of the debtor comprised in the deed.

The General Order of the 22nd of May, 1862, directs, that in addition to the affidavit or certificate required to be delivered to the Registrar under the section referred to, there shall be delivered a copy of the deed, and also a full account, in the form of a schedule, of the debts of the debtor of £10 and upwards, with the names and the residences of the creditors, distinguishing those who have assented to the deed, and that such account shall be accompanied by an affidavit of *the debtor* verifying the same.

In the present case the deed had been executed by the debtor, and had been assented to by the requisite number of creditors, but the debtor had refused to make any affidavit to enable the deed

(1) 24 & 25 Vict. c. 134.

to be registered. An affidavit, containing all the particulars and accounts required by the Act and the General Order, had accordingly been sworn by the managing clerk of the solicitor acting in the matter, who was well acquainted with the facts. It appeared that the object of the debtor was to prevent the deed from being carried into effect This was the last day allowed for registration.

Mr. *A. G. Langley* appeared in support of the application, and contended that the condition prescribed by the Act having been complied with, the direction in the order as to the affidavit being made by the debtor himself was only mandatory, and might be dispensed with on sufficient cause being shown. This had been done by the Lords Justices in *Re Trump* (1), where the order was in the first instance made that the deed should be registered provisionally; as well as in two cases before Mr. Commissioner *Holroyd: Re Springate* (2); *Re Blakeborough* (3).

SIR G. J. TURNER, L.J., after expressing his opinion that it was an inconvenient practice to order a deed to be registered provisionally, said that as this was a matter not affected by the Act, but only by the General Order, the Court might dispense with that order. The deed might therefore be registered upon the affidavit which had been made.

SIR H. M. CAIRNS, L.J., concurred.

Solicitors: Messrs. *Flux & Argles.*

(1) 14 W. R. 494. (2) 11 W. R. 219.
(3) 13 W. R. 105.

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SCHOTSMANS *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Stoppage in transitu—Jurisdiction—Equity—Purchaser's Ship.

A bill in equity will lie to enforce a right of stoppage *in transitu*.

Goods were shipped by a vendor on board a ship belonging to the purchaser, but employed as a general trader. Four bills of lading were made, under which the goods were deliverable to the purchaser or assigns; three of the bills were kept by the vendor, and one by the master of the ship:—

Held, that the delivery on board the purchaser's ship was delivery to the purchaser so as to preclude stoppage *in transitu* before the delivery of the goods at the port of consignment.

Decree of the Master of the Rolls reversed.

THE Plaintiff in this case was a merchant in *France*, and contracted to sell to the Defendant, *Cunliffe*, trading at *Hull* as "*James Fort & Co.*," 1870 sacks of flour. The Plaintiff accordingly directed Messrs. *Delafosse*, his agents at *Rouen*, to buy and ship the flour. There was a line of steamers running between *Rouen* and *Goole*, and advertised as belonging to Messrs. *Watson, Cunliffe, & Co.*, some of which belonged to *Cunliffe*, and some to *Watson*, his partner in that business. The Plaintiff, or his agents Messrs. *Delafosse*, were directed by *Cunliffe* to ship the flour by this line of steamers, *Cunliffe* calling them in his letter "our steamers," and saying that there would be room in the steamer of the 30th of September. In this steamer, which was the *Londos*, and belonged to *Cunliffe*, the flour was accordingly shipped by Messrs. *Delafosse*. The captain of the *Londos* signed four bills of lading of the flour, which made it deliverable to *James Fort & Co.*, or assigns. He gave three to Messrs. *Delafosse*, and kept one. Certain bills of exchange accepted by *Cunliffe*, and given to the Plaintiff, having been dishonoured, *Craig* the agent of the Plaintiff at *Goole*, on the arrival of the *Londos* at *Goole*, produced one of the bills of lading given to Messrs. *Delafosse*, with an indorsement by Messrs. *Delafosse* directing payment to the Plaintiff, and an indorsement by the Plaintiff to *Craig*, and served notice on the captain of the *Londos* not to part with the flour to the order of *Cunliffe*, and on the *Lan-*

cashire and Yorkshire Railway Company to warehouse the flour to the order of *Schotsmans*. The flour was however landed, and put into the warehouses of the company, to the order of *Fort & Co.*, and soon afterwards *Cunliffe* was adjudged bankrupt.

The Plaintiff, *Schotsmans*, thereupon filed the bill in this suit against the railway company, *Cunliffe* and his assignee in bankruptcy, and claimed the flour, as having been stopped *in transitu*. The cause was heard before the Master of the Rolls, who made a decree in favour of the Plaintiff's lien as reported (1), where the facts of the case and the arguments employed are fully set out.

The railway company appealed, and the case was argued before the Lords Justices in June, 1866, but, in consequence of the retirement of the Lord Justice *Knight Bruce*, was set down again for argument before the Lord Chancellor and the Lord Justice *Cairns*.

Mr. *Jessel*, Q.C., and Mr. *Bird*, for the Appellants:—

The doctrine of stoppage *in transitu* is purely a common law doctrine: *Gibson* v. *Carruthers* (2); and there is no case of any such jurisdiction having been exercised by a Court of equity. *Goodhart* v. *Lowe* (3); *Snee* v. *Prescott* (4). Even if this is put as a bill for an account, the Plaintiff is only a mortgagee, and cannot ask for an account. But we contend that it is no stoppage *in transitu* at all: the ship belonged to *Cunliffe*, and the delivery was complete when the goods were put on board her: *In re Humberston* (5): especially as there was no contract to send to *Goole: London and North Western Railway Company* v. *Bartlett* (6); *Mitchel* v. *Ede* (7); *Ogle* v. *Atkinson* (8). In those cases the ownership had not passed, but here it clearly has, and the only question is, whether the transit still continues. Even if the Court has jurisdiction, this is not a case for its interference: let the Plaintiff bring his action.

Mr. *Baggallay*, Q.C., Mr. *Eddis*, and Mr. *Butt*, for the Plaintiff:—

All the cases cited here and in the Court below, on the other

(1) Law Rep. 1 Eq. 349.
(2) 8 M. & W. 321.
(3) 2 Jac. & W. 349.
(4) 1 Atk. 245.
(5) De G. 262; 8 Jur. 675.
(6) 7 H. & N. 400.
(7) 11 Ad. & E. 888.
(8) 5 Taunt. 759.

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side, depended on special circumstances. Though the captain was the servant of *Cunliffe*, the ship was a general trader, and took these goods in her regular course of business; and until they were delivered in *England* they remained *in transitu*: *Coxe* v. *Harden* (1). Three of the bills of lading were retained by Messrs. *Delafosse*, and the fourth was only retained by the master in the regular course of business, and he was bound to deliver up the goods to the person who produced the others: *Smith*, Merc. Law (2); *Abbott* on Shipping (3): and the goods ought not to be delivered except to the person who does so. This shews that the delivery of the bill of lading was the delivery of the property. On board the ship the goods were in the hands of a common carrier, who is liable if he does not deliver them to the proper person: *Fearon* v. *Bowers*, cited in *Mason* v. *Lickbarrow* (4). The goods were placed in the hands of the master, not of the owner, and the *transitus* is not ended until the goods are delivered: *Coates* v. *Railton* (5).

Mr. *Jessel*, in reply.

Jan. 28. LORD CHELMSFORD, L.C., after stating the facts of the case, continued:—

Upon the argument of the appeal, it was objected that, although stoppage *in transitu* is an equitable doctrine, it is not the proper subject of a bill in equity. But assuming that such a bill might be maintained, the Defendants' counsel urged several objections to the right of the Plaintiff to stop *in transitu*, the principal objection being, that there was a complete delivery of the flour to the consignee at *Rouen*. We felt the force of this objection so strongly that we desired the Plaintiff's counsel to confine their argument to it, intimating to them that, if necessary, we would afterwards hear them on the other points raised on the part of the Defendants. Upon full consideration, we are agreed that the case must be disposed of upon this ground alone.

(1) 4 East, 211.
(2) Page 306.
(3) Page 280.
(4) 1 Sm. L. C. 4th ed. 619.
(5) 6 B. & C. 422.

I think it right, however, to say that I entertain no doubt of the Plaintiff's claim being the proper subject of a bill in equity.

It is of the essence of the doctrine of stoppage *in transitu*, as was most correctly and clearly stated by Lord *Cranworth*, when Baron *Rolfe*, in the case of *Gibson* v. *Carruthers* (1), "that during the *transitus* the goods should be in the custody of some third person intermediate between the seller who has parted with and the buyer who has not yet acquired actual possession." If the goods are actually delivered to an agent of the vendee, employed by him to receive delivery, the vendor is divested of his right of stoppage *in transitu*. On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. In this case the goods were shipped on board the consignee's own ship, and delivered into the possession of his own servant, the master, who signed bills of lading making the goods deliverable to the consignee or assigns. There was therefore a delivery to the agent for his principal, and no control over the delivery was in terms reserved to the vendor. The possession of three out of the four bills of lading by the agent of the vendor was a fact of no importance. It gave him no authority over the delivery of the goods, nor any power to transfer the bills of lading themselves. Supposing the Plaintiff to have been ignorant of the fact that the vessel in which he shipped his goods belonged to the consignee, a question might have arisen, whether the delivery could properly be held to be complete. It would seem to be scarcely just to a person who has delivered goods to be carried to a consignee, under the belief that he could exercise the ordinary right of an unpaid vendor over them, to deprive him of that right because he had ignorantly placed the goods on board the consignee's own vessel, and therefore must be taken to have made an absolute delivery of them. It is unnecessary, however, to dwell upon this point, because I think there is satisfactory evidence that the Plaintiff's agent knew that the vessel in question belonged to *Cunliffe*, the consignee, named in the bill of lading as *Fort & Co.*

The Plaintiff having therefore placed his goods in the ship with

(1) 8 M. & W 328.

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full knowledge that the consignee was the owner, can it be said that the delivery at *Rouen* was not absolute and complete?

The authorities upon this subject appear to make the distinction between the case of the ship of the vendor being sent out expressly to receive the goods, and that of the goods being shipped without any previous arrangement for the purpose. In either case, the words of *Parke*, B. in *Van Casteel* v. *Booker* (1) apply, "the delivery in the purchaser's own ship is a final delivery at the place of destination."

If the vendor desires to protect himself under these circumstances, he may restrain the effect of such delivery, and preserve his right of stoppage *in transitu* by taking bills of lading, making the goods deliverable to his order or assigns. Not only was this precaution not taken in the present case, but the bill of lading, which is always made out by the directions, or at least with the assent, of the shipper, makes the goods deliverable to the consignee or assigns. The Master of the Rolls thought that the whole case was involved in the question "whether the *Londos* was a ship trading generally, or was specially sent for the express purpose of receiving the flour?" I cannot discover that this distinction has ever been made the ground of any previous decision. His Lordship thinks that it is to be found in the case of *Mitchel* v. *Ede* (2), which he regards as having decided that a general ship "stands expressly in the same situation as a common carrier." But *Mitchel* v. *Ede* was (as was frequently observed in the course of the argument), not a case of stoppage *in transitu*, but a question whether between two persons, creditors of *Mackenzie*, a *Jamaica* planter, the property in certain sugars, shipped by him on board one of the vessels of the Defendants, which were in the habit of being sent out with supplies to estates in *Jamaica*, and receiving consignments from the estates of *Mackenzie* and other planters in return, and of taking out and bringing home goods from different shippers when offered, passed to the Plaintiff or the Defendants. The bill of lading signed by the captain made the sugar deliverable to the Defendants, or their assigns, but it was indorsed by *Mackenzie* with a condition that it should be delivered to the Defendants only on their giving security for the payment of

(1) 2 Ex. 691. (2) 11 Ad. & E. 888

4 Ex 488

certain bills of exchange. The bill of lading was never in the hands of the Defendants, for *Mackenzie* being indebted to the Plaintiff for advances made to him, indorsed and delivered the bill of lading to the Plaintiff, and it was held that no property in the sugars passed to the Defendants by the delivery into their ship under the above circumstances. It appears to me that this case was not decided upon the distinction between a general ship and one sent for the express purpose of receiving the sugar, for if it had been a question of stoppage *in transitu*, upon a sale of the sugar to the Defendants, and it had been delivered into the Defendants' own vessel sent out for the purpose, although the property in the goods would have passed, yet the effect of the delivery would have been restrained by the indorsement on the bill of lading, and the right to stop *in transitu* would have been preserved. This appears to be established by the case of *Turner* v. *Trustees of Liverpool Docks* (1). The Master of the Rolls is reported to have said that if the bills of lading had been sent to *Fort & Co.* (that is, to *Cunliffe*) he apprehended "that the right of stoppage *in transitu* would have been at an end as soon as he got the bills of lading. So also if delivered to his agent on board the vessel." But the mere possession of the bill of lading by the consignee, or his agent, will not in general prevent the right of stoppage *in transitu*. It will certainly enable the consignee, by indorsing the bill over, to deprive the vendor of this right, and the delivery of it in a certain form to the consignee or his agent, may be part of a state of facts from which a complete delivery of the goods may be established. But by itself the mere possession of the bill of lading, by a consignee or his agent, will not prevent the exercise of the right of stoppage *in transitu*.

I have said that the question as to the continuance or termination of the *transitus* is one which must be determined by the facts of each particular case, and I have founded my opinion that there was a complete delivery of the flour at *Rouen* entirely upon the evidence. The consignee was the owner of the vessel on board which the flour was shipped; the master was his servant or agent. The vendor's agent, with a knowledge of these facts, delivered the flour to the consignee's agent to be conveyed to the consignee, and

(1) 6 Ex. 543.

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he assented to the bills of lading being made out for delivery of the flour to the consignee or assigns. He placed no condition or restriction upon the delivery, so as to leave the vendor any control from the moment the flour was shipped in the consignee's known ship, under such a bill of lading. If the intention of a vendor has anything to do with the question, these facts and circumstances are an undoubted indication of the intention that the possession, as well as the property of the flour, should pass to the consignee at the time of its shipment at *Rouen*.

For these reasons, I think that the order of the Master of the Rolls must be reversed.

SIR H. M. CAIRNS, L.J., after stating the facts of the case, continued:—

The question is, did the right to stop *in transitu* exist? Or, in other words, was the delivery on board the *Londos* a delivery to *Cunliffe*, the purchaser of the goods?

The property in the goods, it is admitted, vested in *Cunliffe* on the contract of purchase and the appropriation of the goods. The goods were to be delivered on board at *Rouen*. The *Londos* was the ship of *Cunliffe*, and indicated as such for the delivery of the goods. The master was his servant. No special contract was entered into by the master to carry the goods for, or to deliver them to, any person other than *Cunliffe*, the purchaser. In point of fact, no contract of affreightment was entered into; for the person to sue on such a contract would be *Cunliffe*, in whom was vested the property in the goods, and the person to be sued would be the same *Cunliffe*, as owner of the *Londos*. The essential feature of a stoppage *in transitu*, as has been remarked in many of the cases, is, that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them. It was suggested here, that the master of the ship was a person filling this character, but the master of the ship is the servant of the owner, and if the master would be liable because of the delivery of the goods to him, the same delivery would be a delivery to the owner, because delivery to the agent is delivery to the principal.

In the absence, therefore, of distinct authority to the contrary, I should be clearly of opinion that the flour in question had been delivered to *Cunliffe* in *Rouen*, and could not afterwards be stopped *in transitu*. It was said, however (and this appears to be the opinion of the Master of the Rolls), that the case of *Mitchel* v. *Ede* (1), determined that delivery on board a general ship like the *Londos* could not be a delivery to the purchaser, though the owner of the ship. The case of *Mitchel* v. *Ede* was not a case of stoppage *in transitu*, or of vendor and purchaser. The question in it was, whether a *Jamaica* planter, who had promised to consign sugars to his *London* correspondent, to whom he was indebted, had by shipping sugars on board a general ship of this correspondent, irrevocably appropriated them so as to pass the property and debar himself from altering their destination. It was necessary to ascertain *quo animo* was the delivery made, and the Court, on a special case, held that the circumstance of the ship being a general or seeking ship, negatived the inference that the delivery was meant to pass the property. In that case, the delivery to the owner of the ship was admitted, and the question was, whether the property passed. Here it is admitted that the property had passed to the purchaser, and the question is, was there a delivery? The case of *Mitchel* v. *Ede* has, in my opinion, no application to the present. I may add that the case of *Cowasjee* v. *Thompson* (2), which was not, I think, referred to in the argument of this case, is, if authority be wanting, strongly opposed to the right of the Plaintiff.

These observations, if well founded, would dispose of the present appeal. But I cannot avoid adverting to an argument which was very strenuously urged by the Appellants, and on which we did not hear the counsel for the Plaintiff. It was said that there was no jurisdiction in a Court of equity to entertain a bill of this description, which was described as a bill calling on a Court of equity to give effect to a stoppage *in transitu*, and filed by Plaintiffs alleging a legal title to chattels for which trover or detinue might be brought at law. And it was said that Lord *Eldon*, in *Goodhart* v. *Lowe* (3), had expressed an opinion that such a bill could not be maintained.

(1) 11 Ad. & E. 888. (2) 5 Moo. P. C. 165.
(3) 2 Jac. & W. 349.

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The case of the Plaintiff *Schotsmans*, as I understand it, may thus be stated. He says he had sold goods, thereby transferring the property at law to *Cunliffe;* that by a stoppage *in transitu*, alleged to be effectual, he has re-vested in himself the legal title to these goods; but that he holds this title merely as security for the price of the goods, and liable to be called on to surrender it on payment of the price; that he is therefore an incumbrancer only, or a person having what Lord *Kenyon*, in *Hodgson* v. *Loy* (1), described as a kind of equitable lien for the price of the goods, which lien or incumbrance he is entitled to realize, the account of what is due being at the same time taken; that the goods are in the meantime in the possession of one of the Defendants, who is a stakeholder or agent holding them merely for the person who is owner, subject to that lien, and that the goods require the protection of an injunction. I should be prepared to hold this to be a case entirely within the province of this Court, and depending on the ordinary principles which regulate in equity the relations of mortgagor and mortgagee, whether of real or personal property, although, for obvious reasons, cases of this kind are more generally and more conveniently brought into a Court of law.

In *Goodhart* v. *Lowe* (2), some goods had been shipped on board a general ship in the *London Docks*, and the Plaintiff, an unpaid vendor of the particular goods, applied to Lord *Eldon* for an injunction to restrain the sailing of the ship, and for a *ne exeat* against the master. The application was to stop the *transitus* of a ship containing the goods of several persons upon a default of one, and it was to this view of the case that the general observations of Lord *Eldon*, on a motion *ex parte* for an injunction, were addressed. The bill in that case, at the original of which I have looked, was not framed as the bill of an unpaid vendor to realize a lien or take accounts; and it is, moreover, during the period since 1819, the date of that case, that the Courts have more clearly shewn a disposition to hold that stoppage *in transitu* does not rescind the contract (in which case there would be no privity in a Court of equity between the parties), but only gives or restores to the vendors a lien for the price.

The foundation of the case of the Plaintiff however having

(1) 7 T. R. 445. (2) 2 Jac & W. 349.

failed, the decree must, in my opinion, be reversed, and the bill dismissed with costs.

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Solicitors for the Plaintiff: Messrs. *Pritchard & Sons.*

Solicitors for the Appellants: Messrs. *Clarke, Woodcock, & Ryland.*

In re VINCENT'S PATENT.

L. C.
1867
Jan. 30.

Sealing of Patent—Objections—15 & 16 *Vict. c.* 83, *s.* 10.

A person may give notice of objection, and oppose the sealing of a patent before the Lord Chancellor, without previously applying to the Court for leave to enter opposition.

The Lord Chancellor, on an application for sealing a patent, will not interfere with the decision of the law officer of the Crown, unless in case of fraud, or surprise, or of some material fact having come to the knowledge of the party since the case was before the law officer.

The sealing of a patent was opposed on the ground of previous public user of the invention, in reply to which the applicant made the case, that such user was obtained by fraud on him, so as to bring the case within 15 & 16 Vict. c. 83, s. 10:—

Held, that such a case ought to be tried before a jury, and that the patent ought to be sealed that such trial might not be precluded.

THIS was an application by Mr. *Vincent*, to have a patent sealed, and was opposed by Mr. *Bruff*, who, in January, 1866, had taken out a patent for the same invention, since which time it had been extensively used. *Vincent* alleged that he was the true and first inventor, and that he had confidentially communicated his invention to *Bruff*, who had applied for and obtained letters-patent for his invention in fraud of his rights. *Bruff*, after giving notice of objection, under 15 & 16 Vict. c. 83, s. 12, had appeared before the Attorney-General and opposed *Vincent's* application, but his objections were overruled by the Attorney-General, who held that there were questions, the trial of which before a jury ought not to be precluded, as would be the case if he refused to allow the sealing of the patent.

Mr. *Glasse*, Q.C., and Mr. *T. Aston*, for *Vincent*, took the preliminary objection that *Bruff* had no *locus standi* for opposing the sealing

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of *Vincent's* patent before the Lord Chancellor, because he had not previously applied to the Court for leave to enter opposition. They referred to *Re Heathorn's Patent* (1), as shewing that such leave was necessary.

The LORD CHANCELLOR overruled the objection, on the ground that the course of proceeding was regulated by the General Order of Lord *St. Leonards*, dated the 15th of October, 1852, which directed how notice was to be given, but did not require the leave of the Court to be obtained.

Mr. *Glasse*, Q.C., and Mr. *Aston*, for *Vincent*, in support of his application:—

This is a *res judicata*. The objections now taken by *Bruff* are the same as those taken by him before the Attorney-General, and this Court will not interfere with the discretion of the Attorney-General unless some fresh case is made which was not before him.

Mr. *Manisty*, Q.C., and Mr. *Macrory*, for *Bruff*:—

We rely on previous publication as making *Vincent's* patent void: *In re Adamson's Patent* (2). If *Vincent* had been the first and true inventor, he would have come forward sooner. There is nothing to rebut the fact of public user. The effect of public user was not before the Attorney-General.

Mr. *Glasse*, in reply:—

We rely on fraud as bringing the case within 15 & 16 Vict. c. 83, s. 10, so as to take away the effect of the public user brought about through that fraud. This is an issue which ought not to be decided against us now, but left to be tried before a jury. The declarations shew that the point of public user was before the Attorney-General.

LORD CHELMSFORD, L.C.:—

It would be making a dangerous precedent to allow an appeal from the law officer of the Crown, unless a case be made of surprise or fraud, or unless some material fact, which if brought before

(1) 4 N. R. 489; 12 W. R. 1068; 10 Jur. N.S. 810 (2) 4 W. R. 473.

the law officer, would probably have led him to decide differently, has subsequently come to the knowledge of the party appealing. I do not think that such an appeal ought to be allowed on the ground that some fact, which was within the knowledge of the Appellant at the time, was not brought before the law officer.

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In the present case, the party opposing relies on public user of the invention, but the applicant raises the point that such user took place in consequence of a fraud which, under 15 & 16 Vict. c. 83, s. 10, would destroy the effect of the user. This is a question of fact which ought to be tried by a jury on *vivâ voce* evidence, and if I were to refuse to allow the patent to be sealed, I should be precluding *Vincent* from the opportunity of having it so tried. The patent, therefore, must be sealed.

Solicitors for *Vincent:* Messrs. *Robinson & Preston.*
Solicitors for *Bruff:* Messrs. *Benham & Tindell.*

In re MITCHELL'S PATENT.
In re BROTHERTON'S PATENT.

L. C. 1867 Jan. 30.

Sealing of Patent—Objections—15 & 16 *Vict. c.* 83, *ss.* 12, 13, 14.

A party who has not opposed the sealing of a patent before the law officer of the Crown under 15 & 16 Vict. c. 83, s. 12, will not be allowed to oppose before the Lord Chancellor.

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MITCHELL applied to have a patent sealed, and was opposed by *Brotherton. Brotherton* applied to have a patent sealed for an invention relating to improvements similar to those claimed by *Mitchell,* who in turn opposed *Brotherton's* application. Neither party had opposed before the Attorney-General, and each objected that on that ground the other party ought not to be allowed to oppose before the Lord Chancellor.

Mr. *Lawson,* for *Mitchell.*

Mr. *Grove,* Q.C., and Mr. *T. Aston,* for *Brotherton.*

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Lord Chelmsford, L.C., said that there was no precedent for allowing a party to oppose the sealing of a patent before the Lord Chancellor, if he had not chosen to avail himself of the opportunity afforded by 15 & 16 Vict. c. 83, ss. 12, 13, 14, of opposing before the law officer of the Crown. Both patents, therefore, must be sealed. No costs allowed to either party.

Solicitor for *Mitchell:* Mr. *J. H. Johnson.*
Solicitors for *Brotherton:* Messrs. *Clarke, Woodcock, & Ryland.*

In re MACKENZIE'S SETTLEMENT.

L. JJ.
1867
Feb. 23, 25; *March* 2.

Covenant to settle Property of given Value—Mode of estimating Value.

A marriage settlement contained a covenant, that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of £400, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement, the wife was entitled, on the death of her mother, to a share in a sum of stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above £400, but the value of the wife's reversionary interest in them at the date of the settlement was much less than £400. On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband:—

Held, first, that the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage:

Secondly, that the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it:

Thirdly, that, in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately.

Order of the Master of the Rolls affirmed.

THIS was an appeal from so much of an order made by the Master of the Rolls as directed the share of the Petitioner, *Jane Dickinson*, in a fund which had been paid into Court, under the *Trustee Relief Act*, to be paid to the trustees of her marriage settlement.

By the settlement made on the marriage of the Petitioners, *Frederic Dickinson* and *Jane* his wife (then *Jane Armstrong*), dated the 4th of October, 1861, a sum of £3000, the property of the husband, was assigned to trustees upon certain trusts. The settlement contained no conveyance or assignment of any real or personal estate belonging to *Jane Armstrong*, nor was there any recital in the marriage settlement with reference to any such estate, except a recital that it had been agreed that the covenant thereinafter contained should be entered into respecting the same. The covenant referred to in this recital was in the following terms:—

"It is hereby covenanted, agreed, and declared, that if the said *Jane Armstrong* now is, or if at any time or times during the said intended coverture she, or the said *Frederic Dickinson* in her right,

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shall become entitled, by descent, transmission, devise, bequest, gift, representation, purchase, or otherwise, to any real or personal property of the value of £400 or upwards, for any estate or interest whatsoever (except jewels, &c., which it is hereby declared shall belong to the said *Jane Armstrong* for her separate use), then and in every such case the said *Frederic Dickinson* and *Jane Armstrong*, and their respective heirs, executors, and administrators, and all other necessary parties, shall, at the cost of the trust estate, as soon as circumstances will admit, and to the satisfaction of the said trustees or trustee, convey, assign, surrender, and assure the said real or personal property, or otherwise cause the same to be well and sufficiently vested in the said trustees or trustee." And the trusts were declared to be for *Jane Armstrong* during her life, for her separate use, and after her death for her husband and the children of the marriage as therein mentioned.

Jane Armstrong was, at the time of the marriage, entitled in reversion expectant on the decease of *Frances Margaret Armstrong*, her mother, to a sum of £468 6*s.* 9*d.* consols, being one-seventh share of £3278 7*s.* 8*d.* consols, which had been paid into Court under the *Trustee Relief Act*, and was standing in the name of the Accountant-General, to the account of "*Frances Margaret Armstrong* and her children," and to £66 18*s.* 1*d.*, further part of the same stock, one-seventh share of another seventh share thereof, to which she had become entitled as one of the next of kin of her brother *Alexander Armstrong*, who had died intestate in the year 1852.

Frances Margaret Armstrong, the tenant for life of the trust fund, died on the 4th of June, 1866, and upon her death a petition was presented by *Frederic Dickinson* and *Jane* his wife, and the other parties interested in the trust fund, praying, amongst other things, that the share to which *Jane Dickinson* was entitled might be transferred to *Frederic Dickinson*, on the ground that the share was not affected by the covenant contained in the marriage settlement. The Master of the Rolls, however, ordered this share to be transferred to the trustees of Mr. and Mrs. *Dickinson's* marriage settlement. *Frederic Dickinson* having since died, *Jane Dickinson*, his widow, who was also his personal representative, appealed from this part of the order.

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Mr. *Baggallay*, Q.C., and Mr. *Roupell*, for the Appellant:—

We contend that the share of Mrs. *Dickinson* in the trust fund was not within the terms of the covenant, being of a less value than £400. She was absolutely entitled to the share at the time of the settlement, subject to her mother's life interest, and the trustees, acting strictly, ought to have sold it as it then stood: *Wilton* v. *Colvin* (1). Its value, taken as a reversionary interest, would be under £200.

But if it is to be taken as after-acquired property, accruing at the death of the tenant for life, it was still not within the covenant; for the two sums of stock came to Mrs. *Dickinson* by different titles, and therefore must be taken as separate sums: *Re Hooper's Trust* (2). Each of these sums was liable to deductions for succession duty and costs, and if the price of consols be considered at the death of the tenant for life, it will be found that the largest of those sums would have been reduced below £400 before it came into the hands of the trustees of the settlement.

Mr. *Freeling*, for the trustees of the settlement:—

It was not intended that the trustees should sell reversionary interests. The covenant referred to property which should fall into possession during the coverture: *Archer* v. *Kelly* (3); *Blythe* v. *Granville* (4); *Atcherley* v. *Du Moulin* (5). The value must, therefore, be estimated at the time of the death of the tenant for life, and as both sums fell in at the same time, the aggregate value must be taken. The value referred to in the covenant is the value of the fund to which the wife was entitled, not the value of her reversionary interest, nor the value of the sum which might be ultimately realized after deducting duty and costs.

Mr. *Baggallay*, in reply.

March 2. SIR G. J. TURNER, L.J., after stating the facts, continued:—

Several points were insisted upon on the part of the Appellant in support of this appeal.

(1) 3 Drew. 617, 2 Jur. N.S. 867
(2) 13 W. R. 710, 11 Jur. N.S. 479
(3) 1 Dr. & Sm. 300; 6 Jur. N.S. 814.
(4) 13 Sim. 190.
(5) 2 K. & J. 186.

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First, that the covenant did not reach the bank annuities which the Appellant had at the time of her marriage, as they were then in reversion, and their value in reversion was less than the sum of £400; secondly, that the seventh of the £3278 7*s.* 8*d.* Bank Annuities and the seventh of the other seventh ought not to be taken together, but must be taken separately, as the sources from which they were derived to the Appellant were different; and thirdly, that each of these sums when it came into possession was of less value than £400, each of them being liable to deductions for succession duty and costs.

Upon the second and third of these points, if it was necessary to decide them, questions of some nicety might arise, but in my opinion it is not necessary to decide them, and I say no more upon them than that these two properties, having come to the Appellant at the same time, and under the same instrument, although by different titles, I am not satisfied that they ought not to be taken together, and thus brought within the covenant. I think, however, that it is not necessary to decide this question. In my opinion, this covenant was intended to reach, and does reach, all property in which the Appellant had at the time of the marriage any estate or interest, if the property itself, as distinguished from the estate or interest which the Appellant had in it, was of the value of £400. The covenant was intended, I think, to sweep in every interest which the Appellant had in property of that value. The terms of the covenant seem to me plainly to import this. They are, "if she is, or if she becomes entitled to property of the value of £400 for any estate or interest whatsoever." Could it be said that if she was entitled contingently, or under an executory devise or bequest, to property of larger value, the covenant would not reach it? and, surely, if property thus circumstanced would be reached by the covenant, property in which she had a vested reversionary interest would also be reached by it.

This construction is, I think, much strengthened by the ulterior part of the covenant, that the property should be conveyed and assigned as soon as circumstances would admit, shewing, as this provision seems to me to do, that the parties had in contemplation property which could not at the time be conveniently dealt with.

I agree, therefore, in the opinion of the Master of the Rolls, and think that this appeal should be dismissed, and with costs.

LORD CAIRNS, L.J.:—

The settlement of the 4th of October, 1861, did not comprise, or refer to, specifically, any property of the Petitioner, *Jane Dickinson*, then *Jane Armstrong*; her property, so far as it was affected by the settlement, was affected through the covenant on which we have to put a construction. She was at the time entitled, subject to the life interest of her mother, *Frances Margaret Armstrong*, to a share in the trust fund mentioned in the Petition as one of the children of the said *Frances Margaret Armstrong*, and she was entitled, subject to the same life interest, to a further share in the same fund, as one of the next of kin of a brother who was then dead.

The Petitioner is now a widow, but her husband, on her marriage with whom the settlement of 1861 was made, was living when the order of the Master of the Rolls now under appeal was pronounced, and the fund had at the time become divisible by the death of her mother.

I am of opinion that the whole of her interest in the fund —both her share in her own right and as next of kin of her brother —was property to which, in the language of the first part of the covenant, she was entitled at the date of the settlement; and I am also of opinion that with regard to property to which she was then entitled, the aggregate value of the whole, and not the value of each separate item or title, must be taken. It is admitted that the share payable to her out of the fund on her mother's death would exceed £400 after all deductions, but it is said that the value of this share in the year 1861 was under £400. The covenant, however, in my opinion, does not refer to the value of her interest in the fund, but to the value of the fund in which she has an interest; just as we should say that a man was entitled to an estate of the value of £100,000 on the death of his father, meaning to describe the value of the estate, and not the interest in the estate.

I think the order of the Master of the Rolls is right, and that this appeal must be dismissed. As, however, the contest arises on a covenant not free from difficulty, a difficulty created in settling

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the Petitioner's own property, and as the parties affected by the contest are the Petitioner in her own right, or as executrix of her husband, and her children, I think the costs of the appeal may be paid out of this share of the fund.

Solicitors for all Parties: Messrs. *Roberts & Simpson.*

L. JJ. 1867 *Feb.* 18.

In re BARNED'S BANKING COMPANY. *Ex parte* THE CONTRACT CORPORATION.

Production of Documents—Privileged Communication—Official Liquidator—Proceedings by alleged Contributory.

In a proceeding by an alleged contributory under the winding up of a company to obtain relief from liability, the official liquidator is in the same position as if a bill had been filed against the company, and he had been made a Defendant for the purpose of discovery. He is therefore bound by the same rules as to answering questions, and producing documents, and is entitled to the same privilege, as such a Defendant would be.

Order of the Master of the Rolls affirmed, but on a different ground.

THIS was an appeal from an order of the Master of the Rolls, made on the 14th of February, on the application of Mr. *Kemp*, the official liquidator of the *Contract Corporation, Limited*, directing Mr. *Coleman*, one of the official liquidators of *Barned's Banking Company*, to answer certain questions and produce certain documents before the special examiner.

Messrs. *Coleman* and *Banner* had been appointed official liquidators of *Barned's Banking Company*, and had prepared a list of contributories, on which the *Contract Corporation* had been placed. The latter company was also in process of being wound up, and the official liquidator, Mr. *Kemp*, disputed the liability of the company, on the ground that the company had been induced to become shareholders of *Barned's Banking Company* by fraudulent representations. For the purpose of making out their case they filed the depositions of various witnesses, and obtained leave to examine the books of *Barned's Banking Company*. This examination had been protracted for a considerable time, and the *Contract Company* then proceeded to examine further witnesses before the

special examiner. On the 11th and 12th of February Mr. *Coleman* was examined by the official liquidator of the *Contract Corporation* as a witness on their behalf.

Mr. *Coleman* had been suffering from ill health, and Mr. *Young*, his partner, in conjunction with Mr. *Banner*, the other liquidator, had drawn up certain documents, which were numbered from 81 to 98, for the purpose, principally, of guiding them in their application for a call upon the shareholders. These were the documents which Mr. *Coleman* refused to produce, and he also refused to answer questions as to his belief of certain matters contained in them.

The document numbered 81 was an approximate statement of the assets of the banking company. Mr. *Coleman* being called upon to produce it, replied as follows:—

"I cannot produce it. I am advised by counsel not to do so. I therefore decline to do so. That statement is the statement to which I have referred as having been prepared by Mr. *Banner* and Mr. *Young*. It was upon the figures in that statement that I formed my opinion on the value of the assets of the bank. The statement was prepared for the purpose of ascertaining the liabilities and probable assets of the bank. That statement was prepared before I made the joint affidavit in this matter, filed on the 6th of December last. I cannot say if it was prepared for the purpose of that affidavit. I dare say it was prepared, amongst other matters, for the purpose of ascertaining the amount of call we should ask for. No. 81 is one of the documents belonging to me as official liquidator. No. 81 contains figures which represent the probable value of the assets of the banking company, and they correctly represent what, in my judgment, was the value of the assets of the company when that statement was prepared, which was about the latter end of October, or the beginning of November, last."

Being asked as to the amount of the estimate which was put, in that document, on the value of one of the debts due to the firm of *I. Barned & Co.*, to the assets and liabilities of which the banking company had succeeded, Mr. *Coleman* objected to answer that question, or any question as to any other *item* in that statement.

The documents numbered from 82 to 98 contained estimates of

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the value of the securities held by the banking company, and other statements and calculations which had been prepared by Mr. *Banner* and Mr. *Young* in the course of the winding-up, and upon which they had made notes and memoranda for their own guidance. Mr. *Coleman* refused to produce any of these documents.

Being asked whether he believed that the firm of *I. Barned & Co.* was solvent or insolvent at the time of the transfer of their business to *Barned's Banking Company*, he objected to answer the question, and he also declined to state his belief as to the amount which would be realised from the assets of the banking company.

The official liquidator of the *Contract Corporation* accordingly moved before the Master of the Rolls that Mr. *Coleman* might be directed to answer the questions, and produce the documents, with respect to which he had made the objection; and his Lordship made the order accordingly (1).

From this decision the official liquidators of *Barned's Banking Company* appealed.

Mr. *Selwyn*, Q.C., and Mr. *Kekewich*, for the Appellants:—

We do not refuse to produce any documents which are, in any

(1) The judgment of the Master of the Rolls was as follows:—"I think the official liquidators have misunderstood their position in this Court. They seem to treat themselves as if they were Plaintiffs in one series of cases, and as if they were Defendants in another series of cases, instead of being officers of the Court in the administration of a long and difficult inquiry. That is their duty and their place. They are not in the situation of Plaintiffs, they are not in the situation of Defendants, and when they apply to this Court for anything, and say they have come to certain conclusions on an inspection of books, all those documents on which they have founded their opinion are so many materials on which the Court alone is bound to come to a conclusion. They are made to assist the Court, and they are made by persons who are the officers of the Court, and for that purpose this very document was made, on the faith of which I have acted, which I did not ask the official liquidators, Messrs. *Coleman* and *Banner*, to produce when I made a call of £40 per share the other day; and now, when it is asked to be produced, it is said to be a private document between the official liquidator and his own solicitor, which the Court is not at liberty to see, and which this Court, in winding up another company, cannot have access to for the purpose of adjudicating between the parties. If that is the law of the case, I misunderstand the law, and I should be very glad if the official liquidators would carry this case by appeal to the Lords Justices, in order that the *status* of official liquidators may be fully ascertained and determined. In the meantime, to encourage them in doing that, I will disallow them the costs of this opposition."

sense, public documents. But we contend, in the first place, that these documents, and the questions based upon them, were irrelevant. The object of the examination was to shew that the *Contract Corporation* had been induced to take shares by misrepresentations as to the solvency of the banking company; and the estimate which the official liquidators might put upon the value of the assets would be no evidence on that point. They were also privileged, for they were private calculations and notes made by us to assist us in framing the application for the call which was to be made on the shareholders.

The Master of the Rolls proceeded upon the supposition that an official liquidator is in the position of an officer of the Court, and is bound to produce any documents and to answer any questions which may be required by any one. But this is not the case: *In re Agriculturists' Cattle Insurance Company* (1). He represents the company, and when there is a dispute he must protect its interests. He ought not, therefore, to produce the company's case to its opponents.

Mr. *Roxburgh*, Q.C., and Mr. *Swanston*, for the official liquidator of the *Contract Corporation*, were not called on.

SIR G. J. TURNER, L.J.:—

In the view which we take, the official liquidator is in the same position as a Defendant to a suit brought by an alleged contributory in *Barned's Banking Company*, seeking to be relieved from his liability, and the official liquidator insisting that he has no right to be so relieved. If such a bill had been filed, it would have been competent to the alleged shareholder to ask the liquidator all or most of the questions which have been put on this examination, as to the grounds on which he had come to the conclusion at which he has arrived, and on what particular materials. I do not see how he could have refused to answer such questions or to produce such materials, unless the matters to which the questions relate, or the materials, had passed as confidential communications between him and his solicitor. I do not understand that any of the documents in question are said by the Appellants to come up to that. It is not said that they were prepared to

(1) 9 W. R. 910.

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enable the solicitor to frame the affidavit, or for any other purpose which would bring the answers to the questions within the authorities as to confidential communications between solicitor and client. The parties wish us to decide what questions the official liquidator is bound to answer, but we cannot go further upon the present application, than to decide that he is in the position of a Defendant to a suit, and is bound to answer any question which such a Defendant would be bound to answer, and is entitled to all the privileges of such a Defendant. The order of the Master of the Rolls must be affirmed, and the examination of the official liquidator must be continued.

SIR H. M. CAIRNS, L.J. :—

I am of the same opinion. I think no safe rule can be applied at this stage of the proceedings, except that which my learned brother has expressed, namely, that the official liquidator is in the same position as if a bill had been filed by a contributory seeking to be relieved from liability, against *Barned's Banking Company*, to which the official liquidator had been made a party for the purpose of discovery. Then any question relevant to the case made by the bill would have to be answered; and, in the same way, any document relevant to the case would have to be produced, unless specially privileged.

I wish, however, to guard myself in this respect—that the obligation of a Defendant to answer is a different thing from the question whether his answer is admissible evidence when the cause comes to a hearing. For instance, the official liquidator may have to state on what grounds he founds his belief; but on the hearing this would be no evidence against the company, not being an admission made by a party really chargeable; it is, in fact, only one of the matters of discovery to which the Plaintiff is entitled. The order of the Master of the Rolls must be affirmed. The costs of all parties here, and in the Court below, must come out of the funds of *Barned's Banking Company*.

Solicitors for *Barned's Banking Company*: Messrs. *Freshfields & Newman.*

Solicitors for the *Contract Corporation*: Messrs. *Linklaters, Hackwood, & Addison.*

ELLISON *v.* SHARP.

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March 2.

Practice—Abatement by Bankruptcy—Revivor for Costs.

The Plaintiff, in a suit in which nothing remained to be done but the taxation and payment to him by the Defendant of his costs, became bankrupt:—
Held, that a supplemental order to carry on proceedings might be made on the application of his assignees.

ON the 9th of May, 1866, an order was made in the cause by consent that the Plaintiff's costs should be taxed, and that upon the Defendant paying to the Plaintiff £75 with interest, and the costs, when taxed, the Defendant should be let into possession of the property mentioned in the bill as from May 1, 1866, and the bill stand dismissed.

On the 16th of May, the £75 and interest were paid. Soon afterwards the costs were carried in to be taxed, but, on the 23rd of June, before the taxation had been completed, the Plaintiff became bankrupt. The Defendant had previously been let into possession.

Mr. *Kekewich*, for the creditors' assignee, applied, on the 25th of February, to Vice-Chancellor *Wood*, for a supplemental order to carry on proceedings, and referred to *Farrall* v. *Davenport* (1), where Vice-Chancellor *Stuart* had made the order in similar circumstances. His Honour declined to make the order, but desired that the case might be mentioned to the Lords Justices.

Mr. *Kekewich*, for the application, submitted that the rule against revivor for costs, being founded on the principle "*Actio personalis moritur cum personâ*," had no application to the case of a suit becoming abated or defective by bankruptcy, marriage, or otherwise than by death.

SIR G. J. TURNER, L.J.:—

The principle of the rule which has been laid down, that where a party dies there can be no revivor for costs, is that the right to

(1) Law Rep. 3 Eq. 473.

Wilson Boucicault v Delafield 16 Jur NS 937; 42 LJ Ch 825; 16 Jur NS 1063; 13 WR 64

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receive costs, or the liability to pay them, dies with the person. This principle does not apply to the case of bankruptcy, and I think that the order may be made.

LORD CAIRNS, L.J., concurred.

Solicitor: *H. F. Wood.*

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In re DUNCAN. *In re* TAYLOR'S TRUSTS.

Charity Commissioners—Jurisdiction—Charity founded in England, but administered abroad—16 & 17 *Vict. c.* 137, *s.* 66.

The authority of the Charity Commissioners extends to charities founded and endowed in *England* or *Wales*, although the revenues are applied abroad. And, *semble*, their authority also extends to charities which are founded and endowed abroad, if their revenues are applied in *England* or *Wales*.

THIS was a Petition presented in the matter of *George James Duncan*, a person of unsound mind, not so found by inquisition, and under *Sir S. Romilly's Act* (1), and the *Trustee Act*, 1850 (2), for the appointment of a new trustee of certain charitable trusts created by the will of *William Taylor*.

By his will, dated the 19th of May, 1836, the testator, after making certain pecuniary and specific bequests, gave all the residue of his estate and effects (except real and heritable property) to *James Whitehouse*, *James Forsyth*, *George James Duncan*, and *James Currie Duncan*, upon trust for sale and conversion; and the testator thereby declared that his trustees should stand possessed of his said residuary estate, and the moneys arising therefrom, upon trust to pay and apply, and otherwise dispose of the same, or any part thereof respectively, at such time or times, in such manner, and in or towards such purposes and objects, whether of a particular or general nature, as they, the said trustees, might, from time to time, or at any time, in their absolute interest and discretion, think best, for the promotion of Christian education within the island of *Jamaica*. And he directed his trustees to invest the moneys

(1) 52 Geo. 3, c. 101. (2) 13 & 14 Vict. c. 60.

arising from the said estate in any of the stocks or funds, or other Government securities of the *United Kingdom*, or on mortgages of freehold, copyhold, or leasehold estates in *England* or *Wales*, with power to vary the said investments for others of a like nature.

J. C. Duncan died in 1854, and *James Forsyth* in 1862, and under a power in the will new trustees were appointed in their place. *George James Duncan* having become of unsound mind, the present Petition was presented for the appointment of a new trustee in his place, and on the 8th of June, 1866, an order to that effect was made by the Lords Justices; but the Attorney-General refused his *fiat*, which was necessary under *Sir S. Romilly's Act*, on the ground that the Petition had not received the sanction of the Charity Commissioners.

The Commissioners were, accordingly, served with the Petition, but they declined to give any certificate, on the ground that they had no authority in the case of charities which did not take effect in *England* or *Wales*.

They stated in their reply to the application of the Petitioners, that they did not consider that they had any power to interfere in the case of charities which were administered abroad, although the endowments were in this country; and, on the other hand, that they had in several cases exercised authority over charities administered in *England*, although the endowments were in a foreign country.

The Petition was, therefore, again set down before the Lords Justices, in order that this question might be decided.

The trustees were all resident in *England*, and the funds were invested on mortgage of land in *England*.

Mr. *Baggallay*, Q.C., and Mr. *Woodroffe*, for the Petitioners:—

The question turns upon the construction of the interpretation of the word "charity" in the 66th section of the *Charitable Trusts Act*, 1853 (1), which is as follows:—

"The expression 'charity' shall mean every endowed foundation and institution taking or to take effect in *England* or *Wales*, and coming within the meaning, purview, or interpretation of the statute of the 43 Eliz. c. 4, or as to which, or the administration

(1) 16 & 17 Vict. c. 137.

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of the revenues or property whereof, the Court of Chancery has or may exercise jurisdiction."

The Commissioners are styled in the Act of 1853 "The Charity Commissioners for *England* and *Wales*" (1), and they are appointed to examine and inquire "into all or any charities in *England* or *Wales*" (2). Their powers are only compatible with the management of charities in this country, and could not be exercised in a foreign country. They are to require accounts of the application of the income of the property (3); to give advice and direction as to the application of the funds (4); to frame new schemes for the management of the charity (5); and to do other acts which can only be done in the country where the funds are distributed.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Wickens*, for the Crown:—

The object of the *Charitable Trusts Act* was to deal with the same charities as are subject to the jurisdiction of the Court of Chancery, and the fact of the funds of a charity being applied in a foreign country, is no objection to the interference of the Court: *Attorney-General* v. *Ironmongers' Company* (6); *Attorney-General* v. *Gibson* (7). The Act speaks of the foundation and institution being in this country, and does not refer to the application of the income. The definition of the word "charity," in the *Charitable Trusts Act*, 1855 (8), confirms this. The 48th section of that statute enacts that, "in the contruction of the principal Act, and this Act, the word 'charity' shall include every institution in *England* or *Wales*, endowed for charitable purposes, but shall not include any charity or institution expressly exempted from the operation of the Act of 1853." There is no allusion to the place where the funds are to be applied. The Act is a remedial one, and ought to be construed liberally. If the whole of the machinery of the Act is not applicable to a foreign country, that

(1) Sect. 6.
(2) Sect. 9.
(3) Sect. 10.
(4) Sect. 16.
(5) Sect. 54.
(6) 2 Beav. 313; S. C. Cr. & P. 208; 10 Cl. & F. 908.
(7) 2 Beav. 317 (n.)
(8) 18 & 19 Vict. c. 124, s. 48.

is no reason why the powers of the Commissioners should no be exercised for the benefit of the charity, so far as they are applicable.

Mr. *Baggallay*, in reply.

March 8. SIR G. J. TURNER, L.J. :—

This is a question whether the consent of the Charity Commissioners was necessary to the presentation of a Petition in this matter for the appointment of a new trustee of property belonging to the charity mentioned in the Petition.

The charity in question was founded by the will of *William Taylor*, dated the 19th of May, 1836. [His Lordship read the bequest.] The property belonging to the charity consists of several mortgages of estates in this country, vested in the trustees of the will, all of whom are resident in this country, and of whom two are the Petitioners, and the other is the above-named lunatic. The Charity Commissioners have withheld their consent to the presentation of this Petition, not upon the ground of the application being in any respect improper to be made, but solely upon the ground that, in their opinion, the statutes under which they act give them no power or authority over charities to be administered beyond the limits of *England* and *Wales*.

This case, therefore, raises an important question as to the jurisdiction of the Charity Commissioners, and the extent of the powers vested in them.

In determining the question, it is right, in the first place, to observe that the statutes under which the Commissioners derive their powers, having been passed for the public good, it is the duty of Courts of justice to put such a construction upon them as may tend to the furtherance rather than to the restriction of those powers. The statutes to be considered are the 16 & 17 Vict. c. 137, and the 18 & 19 Vict. c. 124. By the first of these statutes, very extensive powers are given to the Commissioners over charities, and by sect. 66 it is defined what the expression "charity" shall mean; and, by sect. 67, it is provided that the Act shall not extend to *Scotland* or *Ireland*. [His Lordship also referred shortly

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to the 9th, 16th, 18th, 23rd, 24th, 26th, 54th, 56th, and 57th sections of the Act.]

I will first consider the question whether, upon the construction of this statute, the Commissioners have power or authority over charities to be administered beyond the limits of *England* and *Wales*. This must depend, primarily, upon the interpretation of the word "charity" as defined by the 66th section. This definition is as follows:—[His Lordship read the definition as stated above.]

Now, according to this definition, as I understand it, the question whether a charity is within the Act, is not governed by the question whether the charity is to be administered in *England* or *Wales*, but is governed by this—whether the endowed foundation and institution, meaning, of course, an endowed foundation or institution for charitable purposes, takes or is to take effect in *England* or *Wales*. If the foundation and institution be in *England* or *Wales*, the charity must, as it seems to me, according to this definition, fall within the Act. Whether it be or be not within the meaning, purview, or interpretation of the statute of *Elizabeth*, it is hardly possible that it should not be within the jurisdiction of the Court of Chancery, and certainly it cannot be said that the charity here in question is not within such jurisdiction, both the trustees of the property, and the property itself, being within it. I observe, from the note of the Commissioners' views, with which we have been favoured, that they have considered charities applicable in *England* or *Wales* to be within the Act, though the endowments may not have been in *England* or *Wales*. Whether this view be correct or not, we are not called upon in this case to decide; but, without going the length of saying that there may not be cases in which it might be difficult to maintain this view, I think that, generally speaking, it would be correct, inasmuch as if the application of the charity is to be in *England* or *Wales*, it may well be said that the foundation and institution of it takes effect there, although the property belonging to it may be elsewhere. The foundation and institution of the charity ought, I think, generally speaking, to be considered as taking effect in *England* or *Wales*, within the meaning of the Act, if the application of the charity be there and the endowment abroad, or the endowment be there and the application abroad,

both the property and the application of it being, in effect, parts of the endowment and institution.

If, therefore, the case rested upon the first of these statutes only, my opinion would be in favour of the Commissioners having jurisdiction in this case; but I think the case yet more clear upon the second of these statutes. The 48th section of this second statute (1) is as follows:—[His Lordship read the section.] There is here an express provision that both in the former statute and in this statute, the word "charity" shall include every institution in *England* or *Wales* endowed for charitable purposes. There is no limit of place or purpose in or to which the endowment is applicable, and it cannot, I think, be said that there is not an institution in *England* or *Wales* endowed for charitable purposes, whilst there is an endowment in *England* or *Wales* for those purposes. I observe that the Commissioners, in their note, refer to some difficulties which may arise in the working of the Act, if applied to charities to be administered in foreign parts; but, in my opinion, these difficulties fall far short of what would be required to shew that such charities were not intended to be reached by the Act. There are many purposes of the Act which can be carried into effect with respect to such charities without difficulty, and I can see no reason why such charities are, as to those purposes, to be deprived of the benefit of the Act. Indeed, the difficulties pointed out are no greater than would have to be encountered by the Court of Chancery in the event of its being necessary to proceed by suit, as it might be in many cases, if the Act were held to be inapplicable. In my opinion, therefore, speaking with all possible respect to the Commissioners, this case falls within the Act, and their consent to the application is required.

LORD CAIRNS, L.J.:—

I do not entertain any doubt that a charitable endowment, created by a will made and coming into operation in *England*, when the trustees are in *England*, and the property in *England*, is a charitable endowment, foundation, or institution, taking effect in *England* within the Act of 1853, and is also an institution in

(1) 18 & 19 Vict. c. 124.

L. JJ. 1867 *In re* DUNCAN. *In re* TAYLOR'S TRUSTS.

England, endowed for a charitable purpose within the Act of 1855, even although the revenue or proceeds of the charity is or are to be applied abroad. The present Petition is, in my opinion, one which requires the certificate of the Charity Commissioners.

The question is not before us, whether an endowment for charity where the revenue is to be applied in *England*, but the trustees or property are or is abroad, is, or is not, within one or both of these Acts; but I see no reason to doubt that, as a general rule, where there is the application and expenditure of money in *England* under a charitable endowment, there also the jurisdiction of the Charity Commissioners attaches, to the extent, at all events, of that application and expenditure, even though the constitution of the charity, or the *corpus* of the property, should be abroad.

In both these cases, there may, and probably will, be difficulties in the way of the Commissioners exercising the complete and detailed jurisdiction and inspection which might be exercised under the machinery of the Acts, if the property, the execution, and the application of the charity, were all in *England;* but this circumstance is, in my opinion, entirely insufficient to qualify the natural meaning of the definition given by the Acts of the charities to which they extend.

Solicitors for the Petitioners: Messrs. *Gregory, Rowcliffes, & Rawle.*

Solicitors for the Crown: Messrs. *Fearon, Clabon, & Fearon.*

Ex parte DAVIS & DENTON.
In re DAVIS & DENTON.

L. JJ.
1867
Feb. 22, 23.

Bankruptcy—Annulling Adjudication on Bankrupts' Petition—Delay.

A creditors' assignee applied for an order to annul an adjudication made on the bankrupts' own application, in order that an adjudication by a creditor might be obtained for the purpose of impeaching certain mortgages, comprising the whole of the assets, as being fraudulent preferences or acts of bankruptcy. The assignee had been aware of the existence of the mortgages and that they exceeded the value of the property comprised in them, for nearly three months before he expressed any intention of impeaching them, and for more than four months before he made his application:—

Held (reversing the decision of the Commissioner), that the delay was fatal to the application, inasmuch as there had been enough to put the assignee on inquiry whether the mortgages did not comprise the whole assets, and he might at any time have had the bankrupts examined as to the state of their property.

Per Lord *Cairns*, L. J.:—*Semble*, an adjudication made on the application of a bankrupt may, in a proper case, be annulled without his consent.

THE bankrupts, Messrs. *R. O. Davis & Denton*, carried on business as tug owners in partnership. In January, 1865, they were indebted to *John Wood*, a partner in the firm of *Gregory & Wood*, coal merchants, for coals supplied to their vessels, to the amount of £850; and on the 30th of January, 1865, they executed to *Wood* three separate mortgages of three steam tugs for securing the £850, each mortgage being also made a security for all further sums to become due in respect of articles supplied for the ship comprised in it. In June, 1866, the amount due to *Wood*, or his firm, was about £3500 in all. In that month *Gregory & Wood* informed *Davis & Denton* that no further goods would be supplied, unless a further security was given on the tugs. On the 19th of June, 1866, accordingly, *Davis & Denton* gave separate mortgages on the three tugs for securing all moneys then due and further advances.

On the 18th of July, 1866, *Davis & Denton* petitioned for adjudication against themselves, and were adjudged bankrupts. At this time, the moneys owing to *Gregory & Wood*, or one of them

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amounted to £3732. The tugs had cost £3000, but were now worth less.

On the 6th of August, 1866, *Joseph Davis* was appointed creditors' assignee. It was sworn by the bankrupts, and not denied, that *Joseph Davis* knew at the time of his appointment that the bankrupts had mortgaged these tugs in January, 1865. The bankrupts in the statement of debts, which they filed on the day of presenting their petition, stated that *Gregory & Wood* were creditors for £750, and held a second mortgage of the 19th of June, 1866, on the tugs to secure £1800, and any other sum that might be due to them, which debts then amounted to £3750, the estimated value of the tugs being under £3000. On the 19th of October, 1866, the bankrupts filed their accounts, which shewed the particulars of the mortgages, and shewed also that these tugs were the only assets. On the 31st of October the bankrupts came up for final examination, which was adjourned to the 20th of December, at the request of the assignee, that he might have an opportunity of considering whether any steps should be taken to impeach *Gregory & Wood's* securities; and on the 12th of December he presented a petition, asking that the petition for adjudication might be dismissed, and the adjudication annulled, the Petitioner undertaking to present and prosecute a creditor's petition against the bankrupts. The hearing of the assignee's petition was from time to time adjourned, and on the 6th of February, 1867, an order was made by Commissioner *Holroyd* that *Joseph Davis*, or other sufficient creditor, should be at liberty to file a petition for adjudication upon an act of bankruptcy relating further back than the existing adjudication, and that all proceedings under the existing petition should be stayed until further order.

The bankrupts now moved to discharge the last mentioned order.

Mr. *Reed*, for the bankrupts:—

I submit that the Court had no jurisdiction to annul the adjudication without the consent of the bankrupts, and that if such a jurisdiction exists the assignee has debarred himself from the right to exercise it by his delay. *Ex parte Browne* (1); *Ex parte Har-*

(1) 1 Rose, 151.

court (1); *Ex parte Bourne* (2); *Ex parte Christie* (3); *Ex parte Gallimore* (4); *Ex parte Phipps* (5); *Ex parte Wilbeam* (6), are against the existence of the jurisdiction; and so is the 86th section of the *Bankruptcy Act*, 1861, which gives every debtor the statutable right to petition against himself. Here the petition was filed *bonâ fide*, and no fraud is alleged against the debtors. Assuming, however, that the Court had jurisdiction to annul, in the absence of fraud, and without the consent of the bankrupts, the assignee, knowing of the mortgages, has, by his delay, barred his right to file a creditor's petition. No examination of the bankrupts had been made from August to December, or since. The cases of *Ex parte Sampson, In re Cobham* (7); *Ex parte Savin* (8); are decisive on the question of delay. I submit, also, that the mortgages cannot be construed into acts of bankruptcy, inasmuch as the first mortgage was executed eighteen months prior to the adjudication, and therefore is protected by the 88th section of the Act of 1849, and practically this mortgage covered the subsequent debt. If the assignee desires to attack the second mortgages he can impeach them under sect. 133 of the same Act, as a fraudulent preference, without a creditor's petition.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the assignee (who were desired by the Court to address themselves to the question of delay):—

It would be too severe to hold that, because an assignee is aware of a bankrupt having made a mortgage, he is bound at once to call him up to be examined, in order to ascertain whether it may not have been a fraudulent preference or act of bankruptcy, when there is nothing to cause suspicion. It was only when the bankrupts' accounts were filed that we became aware that this was a mortgage of the whole property of the bankrupts, and until then no delay can be imputed to the assignee. After that the long vacation delayed the taking of proceedings.

(1) 2 Rose, 203.
(2) 2 Glyn. & J. 137.
(3) 2 D. & Ch. 465.
(4) 2 Rose, 424.
(5) 3 M. D. & D. 505.
(6) Buck, 459.
(7) Law Rep. 1 Ch. 476.
(8) Ibid. 616.

L. JJ. 1867

Ex parte DAVIS & DENTON. *In re* DAVIS & DENTON.

SIR G. J. TURNER, L.J.:—

With the greatest respect for the judgment of the learned Commissioner, I am unable to agree with him in this case. Two points are taken in opposition to this order—1st. That there is no jurisdiction to annul the adjudication without the bankrupts' consent; 2nd. That if there be such jurisdiction, there has, in the present case, been such delay on the part of the creditor as to bar his right of applying to the Court for that purpose.

On the first question, I do not intend to give any opinion. I rather think that in *Ex parte Taylor* (1), some difficulty was felt as to making an order to annul without the consent of the bankrupt. It appears that his costs were given him, and it is very likely that something passed which does not appear from the report. The present case must, in my opinion, be disposed of on the ground of delay. The adjudication was made, on the application of the bankrupts, on the 18th of July, 1866; and on the 6th of August, 1866, the Petitioner was chosen creditors' assignee. On the 19th of October, the bankrupts filed their accounts, and on the 31st of October they came up for their final examination. Upon their accounts it appeared that they had made three mortgages of these three steam-tugs, dated in January, 1865, and three subsequent mortgages of them, dated 19th of June, 1866. The object of the Petitioner is to shew that these mortgages of the 19th of June were fraudulent preferences, and an act of bankruptcy; and he urges that, in order to enable him effectually to dispute their validity, there ought to be an adjudication on the petition of a creditor. It is material, then, to consider at what time he first knew of these mortgages. The accounts filed by the bankrupts, at the time of their petitioning for adjudication, shew the existence of the mortgages; and it is established that the Petitioner had notice of them in August, 1866, at the latest. Having this notice, he took no steps till the 31st of October, 1866. It has been urged that it was not necessary for him to do so, for that he did not know that there were no other assets. But it was within his power, at any time after the 6th of August, to have called up the bankrupts for examination, to ascertain what the state of their assets was when the mortgages were made. Again, it is urged

(1) 6 D. M. & G. 737.

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that the vacation, from the 12th of August to the 1st of October, excuses the delay; but from the close of the vacation till the 31st of October nothing was done to shew that the Petitioner intended to dispute these mortgages. In the meantime the proceedings under the bankruptcy had been going on, and the bankrupts had become entitled to apply for their order of discharge, which has been suspended till the present time by the steps taken by the Petitioner. When parties intend to apply for an order of this kind they ought to do so at the earliest possible opportunity. In my opinion, therefore, this order must, by reason of the delay in applying for it, be discharged.

LORD CAIRNS, L.J.:—

I am disposed to think that there is jurisdiction to annul, without the concurrence of the bankrupt, an adjudication obtained by a bankrupt on his own application, in order that an adjudication may be obtained relating back to an earlier act of bankruptcy. But such an application ought to be made speedily, especially when made by the creditors' assignee, both because he is aiming at overthrowing the bankruptcy under which he was appointed to his office, and because he has better means than any one else of obtaining information. Here the adjudication was on the 18th of July, and the creditors' assignee was appointed on the 6th of August. The bankrupts, who traded as tug-owners, filed, on the 18th of July, the accounts which the act requires a person petitioning for adjudication against himself to file; and in those accounts they refer to the first and second mortgages on the tugs, and shew that the mortgages exceed their value. It is true that these accounts do not contain a statement of assets, but on the 6th of August the assignee must have known that no assets in specie had come to hand. Now, the fact that no assets of two tug-owners had come to hand, besides three tugs mortgaged beyond their value, was a strong indication that there were no other assets, and was quite enough to put the assignee on inquiry. Then, till the 12th of December, no effectual step is taken. I am of opinion that such delay is fatal to the Respondent's case.

Solicitors for the Bankrupts: Messrs. *Harrison, Lewis, & Co.*
Solicitor for the Creditor: Mr. *Chidley.*

L. JJ.
1867
Feb. 8, 9.

Ex parte FACHIRI. *In re* FACHIRI.

Bankruptcy Act, 1861, *ss.* 192, 197—*Composition Deed—Examination of Compounding Debtor.*

Sections 192, 197, of the *Bankruptcy Act*, 1861, extend to composition deeds not containing any assignment for the benefit of the creditors.

Under sect. 197, a creditor who has assented to a composition deed may have the debtor examined, for the purpose of obtaining evidence to impeach the deed.

THIS was an appeal by two debtors who had executed a composition deed, from two orders of Mr. Commissioner *Perry*, for their committal for refusing to answer the questions put to them on their being summoned for examination under sect. 197 of the *Bankruptcy Act*, 1861.

The deed bore date 28th of April, 1865, and was a simple composition deed, providing for the payment of a composition of 3*s.* 9*d.* in the pound to the creditors, and not containing any assignment of property. It was registered under sect. 192 of the *Bankruptcy Act*, 1861. The *Mercantile and Exchange Bank, Limited*, who were creditors for a considerable sum, assented to the deed, and it was executed on their behalf by their manager. On the 9th of June, 1865, they received the composition of 3*s.* 9*d.* in the pound on their debts.

On the 15th of November, 1866, the solicitors of the bank were informed that the Messrs. *Fachiri* had paid one of their principal creditors £2000 over and above the composition to induce him to execute the deed, and that the debts of several of the assenting creditors had been overstated in the deed for the purpose of making up the statutable majority. The bank thereupon at once commenced proceedings, with a view to have the deed set aside, and by virtue of a request, dated 12th of December, 1866, from one of the Commissioners of the Court of Bankruptcy in *London*, a private sitting for the examination of the debtors was appointed by the Commissioner at *Liverpool*, where they were now carrying on business. The debtors being summoned attended, but refused to answer any question as to their dealings with the creditor to whom

they were alleged to have paid the bonus. The learned Commissioner thereupon made separate orders for their committal, which they now moved to discharge.

Mr. *Bacon*, Q.C., and Mr. *Marten*, for the appeal motions:—

We contend: first, that the Court has no jurisdiction to examine these debtors. The deed was a mere composition deed, containing no assignment of property, and is not within sects. 192, 197, of the *Bankruptcy Act*, 1861. Sect. 221 cannot apply to the case of a man who has made a bargain with his creditors. *Ex parte Brooks* (1), and *In re Marks' Trust Deed* (2), are distinguishable. But, supposing such jurisdiction to exist, it ought not to have been exercised in this case: first, because a creditor cannot be allowed to avail himself of the jurisdiction for the purpose of shewing that the deed is void, and so destroying the foundation of the jurisdiction; and secondly, because the Court of Bankruptcy has no jurisdiction to set aside the deed, and ought not to take evidence for a purpose with which the Court has nothing to do. The Court has a discretion as to ordering the examination: *Ex parte Alexander* (3). Assuming the Court to be against us on both these points, we say that the delay which has taken place is fatal to the case of the Respondents: *Ex parte Banfield* (4); *Ex parte Savin* (5). [*In re Carter* (6) was also referred to.]

Counsel for the Respondents were desired by the Court to confine their arguments to the question, whether the debtors could be examined for the purpose of impeaching the deed, and to the point as to delay.

Mr. *De Gex*, Q.C., and Mr. *Hemming*, for the Respondents:—

The first question is decided by *Ex parte Brooks*, and *In re Marks' Trust Deed*. Why should not such an examination be had, when it is settled that a bankrupt may be examined with a view to annulling the adjudication? *Ex parte Bonsor* (7); *In re Adams* (8).

(1) 12 W. R. 924.
(2) Law Rep. 1 Ch. 429.
(3) 1 D. J. & S. 311.
(4) Law Rep. 1 Ch. 154.
(5) Law Rep. 1 Ch. 616.
(6) Ibid. 170.
(7) 2 Rose, 61.
(8) Ibid. 27, 33.

L. JJ. 1867

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[The LORD JUSTICE CAIRNS:—The Court has power to annul it, and, therefore, is taking evidence for a purpose within its jurisdiction.]

That is not a necessary ingredient in the power to examine: *Ex parte Alexander* (1); *Cooper* v. *Harding* (2). The Commissioner, as is shewn by the last-mentioned case, had no discretion to refuse the examination. But if there be a discretion, the examination ought to be directed, for a preference is alleged, which, if established, would make the deed void: *Dauglish* v. *Tennent* (3). Moreover, the information which a creditor gets at first is very scanty, and the Court should facilitate his obtaining all information requisite to enable him to judge whether the deed is reasonable. If unreasonable, it is invalid: *Balden* v. *Pell* (4); *Giddings* v. *Penning* (5); *Hickmott* v. *Simmonds* (6). The point has never yet been decided whether a deed can be set aside as unreasonable, because the composition is too small, but it probably will be held that it can. If so, it is right that a creditor should have better information as to the state of the debtor's affairs than is given him by the debtor's own unsupported statement, which is all that the creditor can get, unless he is entitled to an examination of the debtor in the nature of a cross-examination. As to delay, we took steps at once, as soon as we had received notice of anything to cause suspicion, and mere lapse of time cannot be pleaded in the case of a concealed fraud.

Mr. *Marten*, in reply.

SIR G. J. TURNER, L.J.:—

This is an application to discharge orders made by the learned Commissioner, for the committal of the two Appellants, on the ground of their refusal to submit to be examined. Nothing turns on the nature of the particular questions which they refused to answer, the case depends wholly on three questions of general principle:—1. Whether the 192nd and 197th sections of the *Bankruptcy Act*, 1861, apply to mere deeds of composition not con-

(1) 1 D. J. & S. 311.
(2) 7 Q. B. 928.
(3) Law Rep. 2 Q. B. 49.
(4) 5 B. & S. 213; 10 Jur. N.S. 916
(5) Law Rep. 1 Ex. 325.
(6) Law Rep. 2 Eq. 462.

taining any assignment of property for the benefit of creditors. 2. Assuming these sections to have such application, whether the Court of Bankruptcy has power to direct the examination of the bankrupt, or, in the case of a composition deed, of the compounding debtor, or of witnesses, for the purpose of impeaching the bankruptcy or the deed of composition. 3. Whether, supposing the two former questions to be answered in the affirmative, there is or is not a discretion in the Commissioner to refuse or direct the examination; and, if he has such discretion, whether he has rightly exercised it in the present case.

As regards the first point, we did not think it necessary to hear any argument on the part of the Respondents. It has been decided that the 192nd and 197th sections apply to mere composition deeds, and even if it had not been so decided, I should not have felt any doubt on the question. It is impossible to say that a deed, by which a debtor agrees to pay his creditors a given composition on their debts, does not come within the words of the 192nd section, "Every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom;" which cannot be controlled by the words, "As to trust deeds for benefit of creditors, composition, and inspectorship deeds, executed by a debtor," which are placed as a heading, to introduce the series of enactments relative to arrangements with creditors. Such a deed, then, being within sect. 192, is also within sect. 197, which is an enactment intended to work out the rights and liabilities arising under the former section. If express words are wanted to shew this, the referential words, "every such deed or instrument," contained in the latter section, leave no doubt upon the point.

As regards the second point, it is not disputed before us that the object for which the examination is desired, is to impeach the validity of the deed. Now, the 197th section clearly puts the debtor, as to questions between himself and his creditors, in the position of a bankrupt, and the creditors in the position of creditors who have proved under a bankruptcy. The question, therefore, really is, whether in bankruptcy a creditor can examine the bankrupt with a view to impeaching the validity of the adjudication; and I am of opinion that the Court has power to authorize him to do so. Sup-

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pose the case of an adjudication obtained by a fraud, which could only be proved by the examination of the bankrupt, could the Court refuse to allow the bankrupt to be examined for the purpose of proving the fraud? It appears to me, therefore, that, under the 197th section, an examination of the debtor, on behalf of a creditor, for the purpose of impeaching the deed, can be directed. I should have thought so, independently of decision; but the point is, I think, settled by decision. I do not rely on *In re Marks' Trust Deed* (1), though the Respondents have laid great stress on the remarks which I made in that case; but *Ex parte Brooks* (2) is precisely in point: a decision of the Lord Chancellor, which has stood for three years, and which, I think, it is our duty to follow. It is very mischievous for a Court to propound views of the law different from those taken by another Court of co-ordinate jurisdiction; and cases such as the present are especially cases in which it is best *stare decisis*. Great inconvenience might arise if such an examination could not be directed; for a non-assenting creditor, who is to be bound by a deed, has no evidence as to any of the matters bearing on the validity of the deed, except such affidavits of the debtor as are required by sect. 192, clause 5, of the Act, and by the General Order of the 22nd of May, 1862. Where a person not assenting to an arrangement is to be bound by it, because other creditors agree to it, he ought to have a power of investigating the circumstances, and means of examining the debtor ought to be given him.

I do not think it necessary to give any opinion on the question whether the creditor is entitled to have such an examination *ex debito justitiæ*, or whether the Court has a discretion to refuse it. Assuming that the Court has such a discretion, I think that this is not a case in which the examination ought to have been refused. It was urged that there has been great delay on the part of the Respondents, inasmuch as the composition was paid on the 9th of June, 1865, and no attempt made to impeach the deed till November, 1866. But the creditor shews that he had not, until the 15th of November, any notice of the fraud which is imputed to the debtor; and I think that in such a case, the objection on the ground of delay cannot prevail. It is true that during this interval, other

(1) Law Rep. 1 Ch. 429.

(2) 12 W. R. 924,

persons may have been led to deal with the debtor, on the supposition that he was free from his old debts; but they have their remedy against him, if the deed be set aside, and only suffer by his having a larger body of creditors than they expected; and it cannot be said that persons deal with a debtor on the faith of his not owing debts to other persons. I am of opinion, therefore, that this appeal fails.

SIR H. M. CAIRNS, L.J. :—

I concur. If the question had now to be decided for the first time I should feel some doubt whether the 197th section gives a creditor power to examine the debtor, for the purpose of overthrowing the deed. I should feel this doubt, not on any ground of inconvenience, but on the peculiar wording of the 197th section, and because a peculiar jurisdiction being created by that section, it is difficult to say that a creditor can use it for the purpose of shewing that it ought not to have been exercised. At the same time, I feel pressed by the consideration of convenience; for, having regard to the very slight information which the creditors obtain under sect. 192, and the General Order, it is most desirable that a power of examination or cross-examination should exist, for the purpose of enabling them to acquire fuller information; and if such power were held not to exist, the case would call for legislative interference. Finding, then, that the jurisdiction to order such an examination has been affirmed by Lord *Westbury* in *Ex parte Brooks* (1), and by the Lords Justices in *In re Marks' Trust Deed* (2), I think that we ought to follow those cases, and that this appeal should be dismissed, with costs.

Solicitors for the Debtor: Messrs. *Thomas & Hollams.*

Solicitors for the Creditor: Messrs. *Worthington & Plunkett,* agents for Messrs. *Haigh & Deane, Liverpool.*

(1) 12 W. R. 924. (2) Law Rep. 1 Ch. 429.

L. JJ.
1867
March 1, 2.

Ex parte STRAY. *In re* STRAY.

Act of Bankruptcy—Fraudulent Assignment—Assent, Petitioning Creditor estopped by.

6 Ch 547

A debtor having called his creditors together, proposals were made as to a composition. The creditors insisted on an assignment of the debtor's property to trustees for their benefit. He refused to make it; but, after the meeting had broken up, he executed such an assignment. *G.*, one of his creditors, was present during the preparation of this assignment, and, though he denied having been present at its execution, the Court came to the conclusion that he had acquiesced in its being executed, and taken a benefit under it, by having the property protected from execution :—

Held (reversing the decision of the Commissioner), that *G.* could not avail himself of the deed as an act of bankruptcy, although it might be that he had not so far assented to it as to be bound by its provisions.

THIS was an appeal by the bankrupt from an order of Mr. Commissioner *Goulburn*, confirming the adjudication, the objection taken to which was, that the petitioning creditor had assented to the assignment which was relied on as the act of bankruptcy.

The bankrupt *Stray* having been unable to meet his engagements, a meeting of his creditors was held on the 23rd of November, 1866, at the *Hall of Commerce*, which was attended by most of the creditors, and, among others, by Mr. *Goody*, the petitioning creditor, who, with his partner, held an acceptance from *Stray* which would become due on the 4th of December. *Stray* was called upon to state what offer he had to make, and he thereupon offered a composition of 10*s.* in the pound, payable by instalments at three, six, and nine months; and, upon being asked whether he could find security for payment of the last instalment, he said he thought he could. He was then asked whether he would execute an assignment of his estate and effects to his creditors. This he declined, but the creditors pressed for it, on the ground that it was necessary to protect the property from executions. At this time, there was an execution upon part of *Stray's* property, and there was danger of other executions. *Stray*, after retiring to consult with his solicitor, refused to execute an assignment, on the ground that it might be treated as an act of bankruptcy by any creditor who did not assent

to it. Upon this the meeting broke up, without any binding resolutions having been passed, though the creditors had expressed their willingness to accept 10*s.* in the pound, if accompanied by an assignment.

After the meeting had broken up, *Stray* remained in the room, along with Mr. *Honey* (an accountant who had been employed to investigate his affairs, on behalf of some of the creditors), Mr. *Goody*, Mr. *Clapham* (the solicitor of Mr. *Parnell*, the principal creditor), and the secretary of the room, who had taken down notes at the meeting. A discussion took place as to *Stray's* executing the assignment. *Stray* deposed that *Honey* and *Clapham*, in the presence and hearing of *Goody*, assured him that the assignment was not to be used as an act of bankruptcy, but only for the purpose of protecting the estate against executions, and that *Goody* concurred in persuading him to execute an assignment, and that he at last consented to execute it. He then went on to depose as follows:—"11. The said Mr. *Clapham* then produced a parchment form of assignment, and commenced to fill up the same, the said *W. E. Goody* standing close to him, and looking over his shoulder, while he was writing it; and upon the said Mr. *Clapham* making inquiry as to what was the number of Mr. *Parnell's* house (the creditor to whom the assignment was about to be made), the said *W. E. Goody* turned to me, and said, 'Do you know, Mr. *Stray?*' whereupon I replied that I thought the number was 187. I was, at that time, standing at the opposite side of the table at which the said *W. E. Goody* was standing and the said Mr. *Clapham* was writing, and when the said Mr. *Clapham* had filled up the said parchment form of assignment, he passed the same across the table for me to sign." He then went on to say, "The said *W. E. Goody* then came round the end of the table, and stood by my side on the left hand. My said solicitor then wetted the parchment with his finger where I was to sign my name, the said *W. E. Goody* making room for him for the purpose; and I then and there duly executed the said assignment. Upon my having done so, my said solicitor patted me on the shoulder, and said, 'I think you have done right at last,' and the said *W. E. Goody* said, 'I think so too, and I am sure you will think so yourself;' he then shook hands with me, and wished me good morning."

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Mr. *Goody*, in opposition, deposed as follows:—

"After the said meeting had broken up, I stayed behind for a short time to speak to Mr. *Honey* upon a matter of *Sell & Austin*, but I in no way persuaded or joined in persuading the said *F. Stray* to execute an assignment for the benefit of his creditors, having determined, after his refusal at the meeting, not to accept 10*s.* in the pound without further investigation. I abstained from taking part in the discussion that took place, and left the room before any assignment was executed by the said *F. Stray*.

"I never heard Mr. *Honey* represent to the said *F. Stray* that the execution of the assignment was not to be used against him as an act of bankruptcy, but simply for the purpose of protecting the estate in case of an execution being issued against the same.

"I was not present at the time of the execution of the assignment by the said *F. Stray*. It is not the fact that I stood by the side of the said *F. Stray* at the time he executed the said assignment, nor that after the execution thereof by the said *F. Stray* I shook hands with him, and said I thought he had done right at last."

The deed in question was a short deed, in the form of Schedule D. to the *Bankruptcy Act*, 1861, with a release by the creditors to the debtor superadded.

On the 7th of December, 1866, a further meeting of creditors was held, when a resolution was passed:—

"That the assignment executed by the debtor be accepted, and the estate realized under such deed."

After this, in consequence of *Stray's* declaring his intention to prevent the deed being registered, and the estate being administered under it, the meeting passed the following resolution:—

"Mr. *Stray* being called in, and declining to assist in carrying out the assignment, it was unanimously resolved that the estate be administered in bankruptcy."

Stray, it appeared, then requested a delay, to see whether the assent of a large secured creditor to the deed could be obtained, so as to make the deed binding under the 192nd section of the

Act, and the meeting broke up with the understanding that three days should be allowed him for that purpose.

Nothing further having been done, Mr. *Goody* and his partner, on the 12th of December, 1866, filed a Petition for adjudication against *Stray*, upon which he was, on the following day, adjudged bankrupt, the act of bankruptcy being the execution of the above deed.

Stray applied to the commissioner to annul the adjudication, and on the 17th of January, 1867, it was confirmed.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the Appellant:—

The petitioning creditor has so far assented to the deed and received a benefit from it, that he cannot avail himself of it as an act of bankruptcy: *Hicks* v. *Burfitt* (1). It was executed for the limited purpose of guarding the property against executions, and a creditor who assented to its being executed for that purpose cannot avail himself of it for another.

Mr. *Druce*, Q.C., and Mr. *Reed*, for the petitioning creditor:—

There was no assent by the petitioning creditor to any arrangement for the deed having only a particular effect, or being used only for a particular purpose. The case is different from all the reported cases in which the petitioning creditor was held debarred from using the deed as an act of bankruptcy, for, in those cases, the deed had been acted upon as valid with the assent of the creditor.

[The LORD JUSTICE TURNER:—*Goody* received a benefit from the deed by having the property protected from executions. If, then, you find him in any way approving of it, does not the case come very near *Ex parte Alsop* (2)?]

In that case, the petitioning creditor had advised as to a sale under the deed, which was a clear recognition of it as valid.

LORD CAIRNS, L.J.:—

This is an appeal from an order made by Mr. Commissioner *Goulburn*, by which he refused an application made by the bank-

(1) 4 Camp. 235 n. (2) 1 D. F. & J. 289; 6 Jur. N.S. 282

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rupt to annul the adjudication, upon the ground of the invalidity of the act of bankruptcy alleged by the petitioning creditor.

The act of bankruptcy alleged by the petitioning creditor was the execution by the bankrupt of a deed coming within the statutory provision which declares that a fraudulent gift, delivery, or transfer of any of the goods or chattels of the bankrupt, with intent to defraud or delay his creditors, shall be an act of bankruptcy.

It is well settled by a series of authorities, of which the case of *Ex parte Alsop* (1) may be mentioned as the last, that a creditor, who is a party or privy to a deed of the description mentioned in the statute, or who has acted in any way which would be equivalent to an assent, recognition, or approval of the deed, cannot allege that the execution of the deed is an act of bankruptcy. I apprehend that the principle upon which those cases (the authority of which cannot now be questioned) have gone is this, that inasmuch as, under the statute, the petitioning creditor is obliged to allege that the act in question is a fraudulent act, any person who has been a participator or sharer in the fraud cannot be heard to claim any benefit or advantage from the act.

The question, therefore, which is raised in this case is, whether Mr. *Goody* and his partner have in any way, within the meaning of these authorities, been privy to the execution of the deed in question by the bankrupt? It has not been contended, and I apprehend could not be contended, that the deed in question, never having reached that point at which, under the 192nd section of the *Bankruptcy Act*, it would become a valid deed, is not itself in the hands of any one who is not estopped from complaining of it, a valid act of bankruptcy.

Now there is a certain degree of dispute and controversy as to the facts of the case, but to a very considerable extent there appears to me to be no serious contradiction between the witnesses as to what took place. A meeting was held of the creditors of the bankrupt on the 23rd of November, and at that meeting Mr. *Goody* was present. I think the proper conclusion to be derived from all the affidavits is this, that at that meeting nothing was done or determined upon binding upon any person. Proposals were made with reference to a composition. The creditors, for some

(1) 1 D. F. & J. 289; 6 Jur. N.S. 282

purpose or other (whether by way of security or not, there may be a controversy) required that the debtor should execute an assignment for the benefit of his creditors. That assignment, during the continuance of the meeting, the debtor was unwilling to execute, and the meeting broke up. But it is important to bear in mind that it was distinctly stated on that day to Mr. *Goody* and to the other creditors, that there was at that moment an execution upon some part of the property, and that there was a danger of other executions being issued, and it was clearly within the contemplation of every person present at the meeting, that it was necessary, if any arrangement between the debtor and his creditors was to be made, that there should be a protection of the property against executions of this kind in the shape of some assignment of his estate and effects, until the arrangement should be completed.

In that state of things the meeting broke up. Some persons remained in the room where the meeting had been held, and among others, the debtor and his solicitor, and Mr. *Honey;* and Mr. *Clapham*, representing an important creditor, Mr. *Parnell*, and also Mr. *Goody*, one of the firm of the petitioning creditors. On this occasion, and at this time, the deed of assignment in question was executed. It was a deed produced by Mr. *Clapham*, in the shape of a piece of parchment, the greater part of which was printed, the remaining part to be appropriately filled up in order to constitute a deed suitable for the bankrupt to execute. Mr. *Goody* admits he was present during some part of the conversation which proceeded antecedent to the execution of the deed. He says he left before the deed was executed, but I do not find that he denies the very important statement in the affidavit of the bankrupt and of his solicitor, which is contained in the earlier part of the 11th paragraph:—[His Lordship read the first part of that paragraph.] He then goes on to say that Mr. *Goody* was present at the actual execution of the deed. Mr. *Goody*, on the contrary says, not denying anything I have read, that he left the room before the deed was actually executed. Taking this in connection with what I have already mentioned, namely, that a great point had been made at the meeting of the bankrupt executing a deed before his creditors would agree to accept any composition; the fact also that it was present to the mind of all the parties that the property

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was in danger of being made subject to executions; the fact also that Mr. *Goody* and his firm would not become creditors with the capacity of issuing execution until after the 4th of December,—a day subsequent to the day of which I am speaking,—I think it would be impossible to escape the conclusion that at this time Mr. *Goody* was at this place approving, and in the most marked way approving, of the execution by the bankrupt of this deed. I do not mean at all to say that Mr. *Goody* was not in a position, when the question of the *quantum* of composition to be offered and to be accepted came to be discussed, of canvassing the amount to be offered, and of refusing to be bound by the contents of this deed, or by any particular composition; but that he was encouraging the bankrupt to execute this assignment, and thereby protect his property, until an arrangement with his creditors should be made, and to go with this assignment to the creditors in order to persuade them to come into an arrangement, I cannot, on the facts I have mentioned, entertain any doubt.

But it does not stop there. A meeting was called on the 7th of December, for the purpose of presenting the creditors with this deed, and settling with them then as to whether they would accept the composition, and what amount of composition they would accept. Two resolutions were passed at that meeting, certainly somewhat contradictory upon the face of them. The first is a resolution referring to the deed of assignment, accepting it on the part of the creditors, and expressing a desire that the estate should be administered under that deed. It is stated in evidence, that after this resolution was passed, the bankrupt was called in, and that from an attitude which he assumed indicating unwillingness to give the assistance which would be required to carry the deed into effect, the mind of the meeting was changed, and they passed what I may term a counter-resolution, that the estate of the bankrupt should be wound up by proceedings in bankruptcy. But then a further qualification in the mind of the meeting immediately afterwards takes place, whether suggested by the meeting or the bankrupt is quite immaterial, and three days further are given to him (and this is the evidence which both sides agree to), during which he might cast about and obtain, if he could, the assent of the secured creditors, and make this deed a deed binding under the 192nd section of the

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Bankruptcy Act. It seems to have been assumed, that during those three days no step was to be taken adversely by any of the creditors, because Mr. *Goody* says he waited until the end of the three days and then commenced proceedings in bankruptcy. Therefore, the creditors here, including Mr. *Goody* (and that is the important part of the case), again seem to have for a qualified purpose appealed to this same deed, the execution of which, as I have already said, in my judgment, Mr. *Goody* permitted, and appealed to it for the purpose of shielding the estate for a certain number of days, before any steps should be taken against it, and with the view, if assents sufficient could be got at the end of those days, of the deed becoming binding under the *Bankruptcy Act.*

I have no doubt at all that the facts I have thus stated bring the case entirely within the principle of the cases to which I have referred, and I cannot look on Mr. *Goody* otherwise than as a person who assented to the execution of this deed, was taking advantage of the deed for the purpose of shielding the estate for a certain length of time, and was willing, if certain other arrangements such as were contemplated could have been made, to take still further advantage from the deed. I again repeat that I think nothing passed actually to bind Mr. *Goody* entirely to abide by the deed and to come in under the deed as a person who would take no other proceedings for the recovery of his debt, but what I think Mr. *Goody* is estopped from saying is, that this deed, at the moment it was executed under the circumstances I have mentioned, was a fraudulent deed, and one of which he can complain for the purpose of alleging an act of bankruptcy committed by the debtor. I therefore think that the adjudication in this case must be annulled.

SIR G. J. TURNER, L.J.:—

I entirely agree. The sole question here, as I understand it, is, whether Mr. *Goody* was so far party or privy to the execution of this deed, as to debar him from setting it up as an act of bankruptcy. In my opinion he so acted in what passed after the meeting of the 23rd of November, as to debar himself from the right to do so. He stood by, and saw the deed being filled in for the purpose of being executed, and it cannot, I think, be said that because he

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went out of the room before it was actually executed, he was not a party or privy to the execution of it. Had he not intended that it should be executed, he would have protested against it. I can find nothing in what is said to have taken place after the meeting of the 23rd of November, which displaces to my mind the effect of this conduct on the part of Mr. *Goody*. Everything which subsequently took place is reconcilable with the notion that he was not to be bound by the terms of the deed as a deed binding and operative upon him, so as to oblige him to come in under it; but everything which took place is equally consistent with the notion that he was bound by the deed to the extent of being prevented from using it as an act of bankruptcy. He has, besides that, taken advantage of the deed from the time of its execution down to the 7th of December, and for three days after that period, as a protection against any execution which might be lodged against the bankrupt's estate. I cannot think that under these circumstances he can now be permitted to turn round and say, "I will use that deed as an act of bankruptcy which on the 23rd of November I could not have so used." My opinion, therefore, agrees with that of my learned brother.

Solicitor for the Appellant: Mr. *Davis*.
Solicitors for the Petitioning Creditor: Messrs. *Thompson & Son*.

L. JJ.
1866
Nov. 13, 15.

In re BISHOP'S WALTHAM RAILWAY COMPANY.

Judgment Creditor—27 & 28 *Vict. c.* 112, *s.* 4—*Railway Company.*

Where it is not clear that a debtor has any saleable interest in land taken in execution by his judgment creditor, the Court will not order an immediate sale, under 27 & 28 Vict. c. 112, s. 4, but will direct inquiries as to the nature of the debtor's interest.

Semble, that the interest of a railway company in its railway is not saleable under that section.

THIS was an appeal by the *Bishop's Waltham Railway Company* from an order for sale made under 27 & 28 Vict. c. 112, s. 4, on the Petition of a judgment creditor.

The creditor had obtained judgment at law against the company, and sued out an *elegit*, which was delivered to the sheriff. On an inquisition, it was found that the company had no lands in the bailiwick, except the railway, the station, and goods' shed. The sheriff gave legal delivery of these to the judgment creditor. It was returned that there were no goods and chattels of the company within the bailiwick. The creditor then presented a Petition for sale of the interest of the company in the above real estate, and the Master of the Rolls made the order. The railway was at the time worked by another company under parliamentary powers, certain payments being made to the *Bishop's Waltham Railway Company* for the use of it.

Mr. *Jessel*, Q.C., and Mr. *Fitzhugh*, for the Appellants:—

The preamble to the Act furnishes the key to it, and shews that it was not intended to give judgments a more extensive effect than they had before. The first question that arises is, what does the Act mean by "actually delivered"? What has taken place in the present case has hitherto been called a "legal delivery" only, and the Act cannot have intended to include it in the terms "actually delivered." After a legal delivery possession must be obtained by ejectment. Again, it is clear that before this Act a railway company had no saleable interest in its lands other than superfluous lands. They are trustees of the land for the public. The land is vested in them for the purposes of the railway, and cannot be used for anything else. It is a public highway, and the company have no beneficial interest in it, but only in the tolls, which cannot be taken but by the company; 8 & 9 Vict. c. 20, s. 92 (*Railways Clauses Act*); so that the interest in them is not saleable. The company have duties to perform which are inconsistent with their giving up possession; 8 & 9 Vict. c. 20, ss. 63, 65, 66, 68, 71, 72, 76, . . . 85. A *mandamus* will lie to make the company keep the railway in repair, because it is a public duty: *Rex* v. *Severn and Wye Railway Company* (1). The observations in *Reg.* v. *South Wales Railway Company* (2) shew the peculiar nature of railway property. The company, then, has no saleable interest apart from 27 & 28 Vict. c. 112; and that statute does not make it saleable, for

(1) 2 B. & A. 646. (2) 19 L. J. (Q. B.) 272; 13 Q. B. 989.

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a general statute does not by general words repeal a special one and the Act in question was intended to narrow, not to enlarge, the rights of judgment creditors. In the case of *In re Hull and Hornsea Railway Company* (1) it would appear, from the form of the order, that the Court did not intend to do more than order the sale of superfluous lands. But if it did, the decision we submit cannot be maintained. Here there are no superfluous lands, as appears on the Petition, and no order at all ought to have been made on it. [*Russell* v. *East Anglian Railway Company* (2) was also referred to.]

Mr. *Selwyn*, Q.C., and Mr. *Chapman Barber*, for the judgment creditor :—

If the argument as to actual delivery is to prevail, the result will be that no lands will be saleable, under 27 & 28 Vict. c. 112, but lands in the actual occupation of the debtor. The obligations imposed on railway companies are not personal, but attached to the railway.

[The Lord Justice Turner :—It does not appear to me that the existence of any property in which the railway company have a saleable interest is shewn.]

[The Lord Justice Cairns :—Surely the railway is not saleable, and if you wish to enforce your judgment against the tolls, this is not the proper course of proceeding.]

If the interest is not saleable the inquisition may be set aside, but until set aside it is binding on the company.

Sir G. J. Turner, L.J. :—

This Act of Parliament, as it appears to me, was framed with the view of reaching, by sale, property of the debtor which is capable of being sold; and if the property of the debtor which is taken in execution is not capable of being sold, I doubt whether the case comes within the Act. At all events, it is going too far to say that the Court is bound to order a sale when it does not appear

(1) Law Rep. 2 Eq. 262. (2) 3 Mac. & G. 104, 125.

what saleable interest there is, or whether the company have any saleable interest. We can go no further than to direct an inquiry what the interest of the company is in the property found by the inquisition. The Petition will stand adjourned till this inquiry has been answered.

L. JJ. 1866 *In re* Bishop's Waltham Railway Co.

Sir H. M. Cairns, L.J., concurred.

Solicitors for the Petitioner: Messrs. *Pilgrim & Phillips.*
Solicitor for the Company: Mr. *S. C. Frankish.*

GARDNER *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY. *Ex parte* GRISSELL.

L. JJ. 1867 Jan. 22.

Judgment Creditor—27 & 28 *Vict.* c. 112, s. 4—*Railway Company.*

Form of order on Petition by a judgment creditor for sale of superfluous lands of a railway company under 27 & 28 Vict. c. 112, s. 4.

THIS was an appeal by Mr. *Grissell*, a judgment creditor of the *London Chatham and Dover Railway Company*, from a decision of Vice-Chancellor *Stuart* refusing to make an order on a Petition under 27 & 28 Vict. c. 112, s. 4, for the sale of superfluous lands of the company. The lands were situate in a town, so that the adjoining owners had not any right of pre-emption. The Vice-Chancellor had decided in the cause that these lands were affected by the debentures of the company, and had on this ground refused the prayer of the Petition. It had subsequently been decided, on appeal, that the debentures did not affect superfluous lands.

Mr. *Kay*, Q.C., and Mr. *Lindley*, for the Appellant, asked for an order for sale.

Sir *Roundell Palmer*, Q.C., and Mr. *Kekewich*, for the company, contended that inquiries ought in the first place to be directed.

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GARDNER v. LONDON CHATHAM AND DOVER RAILWAY COMPANY. *Ex parte* GRISSELL.

Mr. *Bacon*, Q.C., and Mr. *Martineau*, for the Plaintiff.

[*In re Hull and Hornsea Railway Company* (1), and *In re Bishop's Waltham Railway Company* (2), were referred to.]

Their Lordships made an order as follows:—

Direct the following inquiries:—

1. An inquiry what is due to the Plaintiff under or by virtue of his judgment. (a)

2. An inquiry what lands and property have been extended under or by virtue of the writ of *elegit* in the Petition mentioned, and what are the nature and particulars of the interest of the said company in such lands and property, and of their title thereto; and whether any, and which, of such lands are superfluous lands, and not required for the purposes of the undertaking of the said company.

3. An inquiry whether there are any, and, if any, what, liens, charges, or incumbrances upon the said lands, or any, and what, part thereof; and what are their priorities, and what is due on account thereof respectively.

Adjourn further hearing before their Lordships.

Solicitors for the Appellant: Messrs. *James & John Hopgood.*

Solicitors for the Company: Messrs. *Baxter, Rose, Norton, & Co.*

Solicitors for the Plaintiff: Messrs. *Walker & Martineau.*

(1) Law Rep. 2 Eq. 262. (2) Law Rep. 2 Ch. 382.

(a) The 1st inquiry shd be omitted as being included in No 3 & therefore unnecessary & also because it renders it doubtful whether if it remains, the 1st priority can be investigated under No 3.

In re MEXICAN AND SOUTH AMERICAN COMPANY.

L. JJ.
1867
March 7.

SHEWELL'S CASE.

Company—Contributory—Purchase of Shares by Broker—Laches.

A person's allowing his name to remain for a length of time on the list of contributories of a company without making any objection, does not raise an equity against his applying to have it removed, where no loss is sustained by the estate which would have been avoided if the application had been made earlier. Whether, even in the case of such loss being sustained, any such equity would arise, *quære.*

Order of the Master of the Rolls reversed.

THIS was a motion by way of appeal from an order of the Master of the Rolls, refusing to remove the name of Mr. *Shewell* from the list of contributories of the *Mexican and South American Company.*

The company was formed in 1835, and never kept any register of shareholders, but its shares were transferable by delivery of the certificates.

In December, 1855, the Appellant and his brother, who were stock and share brokers, bought for *H. Bowen Jones,* in pursuance of a verbal order given by him, fifty shares in the company. *Jones* paid for them, and the certificates were handed over to him.

In 1857 an order was made for winding up the company.

In December, 1859, the official manager wrote to *Shewell,* as follows:—"Messrs. *Grisewood & Smith* have informed me that they sold to you fifty shares in the above company on the 9th of December, 1855. I shall feel obliged by your informing me whether you held the same at the date of the order to wind up; if not, how you had disposed of them. I shall be glad if you will, at the same time, favour me with the numbers of the certificates representing the above."

Shewell took this letter to *Jones,* and asked him to send the necessary answer. *Jones* was *Shewell's* family solicitor, and *Shewell* thought no more about the matter until March, 1861, when he received a notice from the official manager that his name was on the list of contributories, and that a call had been made, amounting

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to £562 10*s.* on the fifty shares. *Shewell,* as he deposed, thought that this was owing to some oversight on the part of *Jones,* and sent no reply to the official manager, but handed the letter to *Jones,* and requested him to take the proper steps to get his own name put on the list instead of *Shewell's. Jones* took no steps for that purpose, but paid the call out of his own moneys — the payment being, by arrangement with the official manager, made by three instalments, *Jones* professing to act as *Shewell's* solicitor. *Shewell,* as he deposed, hearing nothing more about the matter, believed that *Jones* had procured the substitution of his own name for that of *Shewell.*

Jones died in December, 1864.

In August, 1866, a second call of £1 per share was made, and notice of it sent to *Shewell,* who thereupon took out a summons to have the list of contributories varied, by substituting the name of *Jones's* personal representative for his own.

The evidence that the shares were the property of *Jones,* and not of *Shewell,* was conclusive. Among other things, it may be mentioned that they were entered in *Jones's* private account-books, among the stock and shares belonging to him, the correct date of their purchase being there given; and the payment of the calls appeared in his own pass-book at his bankers. The certificates were found among *Jones's* private papers.

The Master of the Rolls decided that *Shewell* had been guilty of such laches in not replying to the letter of March, 1861, that his name ought not to be removed from the list.

Mr. *Jessel,* Q.C. (Mr. *Stock* with him), having opened the case, and stated the evidence, was stopped by the Court.

Mr. *Roxburgh,* Q.C., for the official manager, and Mr. *Southgate,* Q.C., for the creditors' representative :—

We submit that the Master of the Rolls rightly held that *Shewell* after allowing his name to remain on the list so long, is not entitled to have it removed, and that of the personal representative of an insolvent substituted for it.

[The LORD JUSTICE LORD CAIRNS :—You have received the

first call, and as the second was not made till after *Jones's* death, what harm has the estate suffered by this delay?]

If the present case had been brought forward in *Jones's* lifetime we should have means of getting at the truth, which we have not now. The evidence raises the suspicion that there must have been an agreement between the parties for *Shewell* to be on the list, *Jones* indemnifying him; otherwise, how is it possible to account for *Shewell's* doing nothing more than speaking to *Jones* again in March, 1861, when he knew that *Jones* had improperly allowed his name to be on the list?

SIR G. J. TURNER, L.J.:—

I do not think that the name of Mr. *Shewell* can be allowed to remain on the list. In 1859 the official manager wrote to him, asking whether he held these shares. He goes to *Jones*, who was his solicitor, and says, in substance, "I bought for you; you are the person to attend to this; be so good as to see that it is all set right." Between that time and 1861 his name appears to have been put on the list; and in November, 1861, an application is made to him for a call. He gives the notice to his solicitor, and tells him to get the matter set right. The solicitor, probably thinking it more for his interest to let *Shewell's* name remain on the list, takes no step to have it removed, but pays the call with his own moneys. There is nothing to shew that *Shewell*, after November, 1861, knew that his name was on the list; and it is most clearly shewn that the shares did not belong to *Shewell*, but to *Jones*, at the time the winding-up order was made. It is said, however, that *Shewell* is debarred from relief by acquiescence. If a man allows his name to remain on the register of shareholders for a length of time, that may raise an equity against him to have it kept there; but I cannot see that his leaving it on the list of contributories raises any similar equity against him. His allowing it to remain there is, indeed, capable of being used as evidence against him that it was rightly placed there; but, in the present case, the evidence that it ought not to have been placed there is conclusive.

As regards the costs, it was the fault of *Shewell's* solicitor that

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made the application at the Rolls necessary. *Shewell*, therefore, ought to pay the costs of that application; but, on the other hand, he ought to have his costs of the appeal motion out of the estate. Under these circumstances, I consider that the best course will be to make an order removing Mr. *Shewell's* name from the list, without any order as to his paying or receiving costs either here or at the Rolls.

LORD CAIRNS, L.J.:—

I am of the same opinion. There is no ground whatever for saying that *Shewell* was the holder of these shares at the time of the winding-up order, or that he ever was a shareholder in this company. The only question in the case is, whether any equity is raised against him by the fact of his name having, through the default of his agent, been allowed to remain on the list of contributories for several years. If its remaining there had occasioned any loss to the company there would have been more to be said in favour of the existence of such an equity, though I much doubt whether it would exist even in that case. But no loss whatever has arisen to the company; for the first call has been paid, and the second call was not made until after the death of *Jones*. The name of Mr. *Shewell* must therefore be taken off the list.

As regards the costs, *Shewell*, as a matter of strict principle, should pay the costs at the Rolls, and receive his costs of the appeal motion out of the estate. I agree that in these circumstances it will be better for all parties that he should neither pay nor receive costs either here or at the Rolls.

Solicitors for *Shewell*: Messrs. *Francis & Bosanquet.*

Solicitors for the Official Manager: Messrs. *Travers, Smith, & De Gex.*

Solicitor for the Creditors' Representative: Mr. *W. Compton Smith.*

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Bills of Exchange—Open Letter of Credit—Promise to accept Bills.

A bank gave to *D. T. & Co.* a letter addressed to them, and expressed thus: "No. 394. You are hereby authorized to draw upon this bank to the extent of £15,000, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back hereof." *D. T. & Co.* drew bills under this letter to the amount of £6000, and indorsed them to the Appellant, who duly indorsed particulars on the letter of credit. The bank was afterwards ordered to be wound up, and *D. T. & Co.* were indebted to the bank to an amount exceeding what was due on the bills:—

Held (reversing the decision of *Wood*, V.C.), that whatever might be the effect of the letter of credit at law, it constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank and *D. T. & Co.*, and that the Appellant was entitled to prove for the amount due on the bills, without regard to the state of the account between the bank and *D. T. & Co.*

THIS was an appeal by the official liquidator of the *Asiatic Banking Corporation* from an order of Vice-Chancellor *Wood*, refusing to admit a claim made against the estate of the *Agra and Masterman's Bank, Limited*, in respect of certain bills of exchange.

On the 31st of October, 1865, *Agra and Masterman's Bank* gave to *Dickson, Tatham, & Co.*, a letter of credit, addressed to them, which was in the following terms:—

"No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit, No. 394, of the 31st of October, 1865."

In May, 1866, *Dickson, Tatham, & Co.*, drew bills on the *Agra and Masterman's Bank*, under this letter, for £6000, and sold them

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to the agent of the *Asiatic Banking Corporation.* The agent, on taking the bills, duly indorsed particulars on the letter of credit. The *Agra and Masterman's Bank* stopped payment before the bills were presented for acceptance. Both banks were now in course of being wound up, and the official liquidator of the *Asiatic Banking Corporation,* who were still the holders of the bills, carried in a claim for their amount under the winding-up of the *Agra and Masterman's Bank.* This was opposed on the ground that *Dickson, Tatham, & Co.,* were indebted to *Agra and Masterman's Bank* to an amount exceeding what was due on the bills.

Mr. *G. M. Giffard,* Q.C., Mr. *Hannen,* and Mr. *Kekewich,* for the Appellant:—

We contend that the Appellant is entitled to prove on three grounds:—1. That *Dickson, Tatham, & Co.,* were agents authorized by *Agra and Masterman's Bank* to promise that the latter would accept the bills. 2. That the letter shewn to the person advancing money constituted, when money was advanced on the faith of it, a contract by the bank to accept the bills. 3. That it would be a fraud on the part of the bank to deny their liability to pay the bills after they had been taken on the faith of the letter.

In Lord *Mansfield's* time, a promise like this would have constituted an acceptance; but we admit that even before the *Mercantile Law Amendment Act* (1), it could not, according to the later decisions, have that effect: *Bank of Ireland* v. *Archer* (2). We admit, therefore, that the persons who took the bills could not have sued upon them as bills; but the promise to accept a bill gives a right of action to the person to whom it was made; *Mason* v. *Hunt* (3); *Story* on Bills of Exchange (4); *Russell* v. *Wiggin* (5); *Marchington* v. *Vernon* (6). Now, looking at the purpose of the letter, it is clear that it was intended to be shewn by *Tatham & Co.,* as proof of their authority to pledge *Agra and Masterman's Bank* to accept the bills. *Tatham & Co.* were thus constituted agents to make a promise on behalf of the bank: *Pickard* v. *Sears* (7).

(1) 19 & 20 Vict. c. 97, s. 6.
(2) 11 M. & W. 383.
(3) 1 Doug. 296.
(4) §§ 459, 461.
(5) 2 Story's Rep. 213.
(6) 1 B. & P. 101, n.
(7) 6 Ad. & E. 469.

Again, an open offer of this kind constitutes a contract with anyone who complies with its terms: *Williams* v. *Carwardine* (1); *Thatcher* v. *England* (2). Thus, in *Denton* v. *Great Northern Railway Company* (3), a promise to issue tickets by a particular train was held to give a right of action to a person who came to the station to get one and found that none were issued. The principle of these cases was affirmed in *Warlow* v. *Harrison* (4). It has been urged that there is no privity, but that is a fallacy arising from looking to the time of writing the offer, not to the time of the other person acting on it. In *Bank of Ireland* v. *Archer* (5), the point was raised on the pleadings, but the evidence did not support them, for there was only a private letter to the agent. Here, what we rely upon is that the letter was written for the purpose of being shewn. In *Pillans* v. *Van Mierop* (6), the money was advanced without any authority from the Defendants, and not on their credit; and the subsequent promise to accept was contended to be a mere *nudum pactum*. Yet the promise was held to give a right of action. The point incidentally arose in *Scott* v. *Pilkington* (7), but the case went off on another ground, and the decision does not affect us; there is only an *obiter dictum* of *Blackburn*, J., which makes against us. There is, therefore, a right of action in the person who takes a bill on the faith of a letter like this. Whether such a right of action can pass with the bill if it be negotiated may be a question, but if it cannot, an equitable right is created which will pass; and it would be against conscience for the bank to set up the state of the account between them and *Tatham & Co.* as a defence against repaying moneys advanced on the faith of a letter like this: *Jeffryes* v. *Agra and Masterman's Bank* (8), has really no bearing on the present case.

Mr. *Dickinson*, Q.C., and Mr. *Roxburgh*, Q.C., for the official liquidator of *Agra and Masterman's Bank*:—

There is no agency; the letter of credit was given for the benefit of *Tatham & Co.*, who were not acting on behalf of the bank; and

(1) 4 B. & Ad. 621.
(2) 3 C. B. 254.
(3) 5 E. & B. 860; 2 Jur. N.S. 185
(4) 1 E. & E. 295, 309; 6 Jur. N.S. 66
(5) 11 M. & W. 383.
(6) 3 Burr. 1663.
(7) 2 B. & S. 11; 8 Jur. N.S. 357.
(8) Law Rep. 2 Eq. 674.

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the letter would accomplish its object of benefiting them, without attributing to it the force now contended for. In *Pickard* v. *Sears* (1), the principal was standing by; there is nothing of the same kind here. *Pillans* v. *Van Mierop* (2), and *Mason* v. *Hunt* (3), were decisions by Lord *Mansfield*, who held that a promise to accept a future bill of exchange amounted to an acceptance of it, so that the authority of those cases on the present question, however great his Lordship's authority may be on other points, is but small. *Johnson* v. *Collings* (4) shews that a promise to accept a future bill is no acceptance, and that is all the letter amounts to in the present case. *Bank of Ireland* v. *Archer* (5) is in our favour; and the American cases, which Mr. Justice *Story* admits to be opposed to the last-named case, are not binding here. How can the indorsees be entitled to claim against the bank? they cannot be supposed to have seen the letter of credit, or to have advanced money on the faith of it. The case distinguishable is from *Denton* v. *Great Northern Railway Company* (6), and the cases of that class, in this—that there the advertisement was issued to all the world; here the letter was addressed to an individual firm.

[The LORD JUSTICE CAIRNS:—Was not the letter intended to be shewn?]

No doubt; but then we get upon the question of equitable, not legal liability. The transferees become equitable assignees of the benefit of a contract between the bank and *Tatham & Co.*, and must take, subject to the same equities as their assignors, *i. e.*, subject to the state of account between the bank and *Tatham & Co.* No doubt the liability to these equities might be excluded by apt words, but there is nothing of the kind in the instrument. *Jeffryes* v. *Agra and Masterman's Bank* (7) supports the claim to set off. Shewing the letter is no more than telling the persons who take bills that the bank has promised *Tatham & Co.* to accept them; the liberty to communicate this promise cannot extend its

(1) 6 Ad. & E. 469.
(2) 3 Burr. 1663.
(3) 1 Doug. 296.
(4) 1 East, 98.
(5) 11 M. & W. 383.
(6) 5 E. & B. 860; 2 Jur. N.S. 185.
(7) Law Rep. 2 Eq. 674.

effect, which is only to give *Tatham & Co.* a right of action if it is broken.

Feb. 11. SIR G. J. TURNER, L.J.:—

I have had the opportunity of considering this case, with my learned brother, since the conclusion of the argument, and we do not think it necessary to trouble the counsel for the Appellant to reply.

The question turns upon the effect of the letter of the 31st of October, 1865, by the *Agra Bank* to *Dickson, Tatham, & Co.* [His Lordship read the letter, and continued.] Now, whatever may be the effect of that letter at law, whether there would be a right of action or not, it seems to me to give the persons who took and paid for bills on the faith of it a plain right in equity to compel the *Agra Bank* to accept and pay the bills. The letter was written in a double form; the first part of it contains the authority which is given to *Dickson, Tatham, & Co.* to draw the bills; the second part is evidently, though not in terms, yet in substance, addressed to the persons who are to negotiate the bills. It is plain that this letter was given by the bank with a view to its being shewn to persons who were to negotiate the bills, and to make advances upon the faith of the letter; and the last passage contains these words: "Parties negotiating bills under it are requested to indorse particulars on the back hereof." It is plain that this part of the letter is in truth addressed to the person by whom the bills were to be negotiated. The whole effect of the letter is, that the *Agra Bank* held out to the persons negotiating the bills a promise that it would pay the bills; and it would be impossible, according to my view of the doctrines of Courts of equity, to allow the bank, after having sent that letter into the world, addressed to the persons who were to negotiate the bills, and so held out to them that it would be answerable for their payment, to say that because there was a debt due to it from the persons to whom it had given the letter of credit, therefore it would not pay the bills. Apart, therefore, from any question as to how the case may stand at law, I think that there clearly is a perfectly good equity to sustain a bill filed by any one of the persons by whom bills drawn

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under the letter of credit had been negotiated, to compel the *Agra Bank* to accept and pay these bills which were taken and paid for upon the faith of the statement which was made in the letter.

SIR H. M. CAIRNS, L.J.:—

It is not disputed in this case that the letter of credit of the 31st of October, 1865, from the *Agra and Masterman's Bank*, to *Dickson, Tatham, & Co.*, constituted a contract between those parties, based upon a sufficient consideration, moving from *Dickson, Tatham, & Co.* to the bank; or that the *Asiatic Banking Corporation*, when they took and discounted or paid for the bills upon which a claim is now made, had notice, and took the bills on the faith, of this letter; or that the bills were drawn in the form prescribed by the letter. But it is contended that the letter, being in form addressed to *Dickson, Tatham, & Co.*, constituted a contract with no one but them; and that this contract, even if assignable in equity, could not be assigned otherwise than subject to all equities between *Dickson, Tatham, & Co.*, and the *Agra and Masterman's Bank*, and that *Dickson, Tatham, & Co.*, are indebted to that bank in an amount exceeding the bills.

The letter of the 31st of October, 1865, is in form addressed to *Dickson, Tatham, & Co.*, but it is evident that it is written to *Dickson, Tatham, & Co.*, in order that it may be shewn by them to those who were to take the bills drawn on the *Agra and Masterman's Bank;* that it is intended by the writers to be used as an inducement to make persons take those bills; and that the bills were to be taken by such persons "under" the letter, that is, upon the faith and under the protection and security of the letter. It is a general invitation issued by the *Agra and Masterman's Bank*, through *Dickson, Tatham, & Co.*, to all persons to whom the letter may be shewn, to take bills drawn by *Dickson, Tatham, & Co.* on the *Agra and Masterman's Bank*, with reference to the letter, and to alter their position by paying for such bills, with an assurance that, if they or any of them will do so, the *Agra and Masterman's Bank* will accept such bills on presentation.

If it be necessary to determine the question of the legal liability of the *Agra and Masterman's Bank*, I am of opinion that, upon the offer in this letter being accepted and acted on by the

Asiatic Banking Corporation, there was constituted a valid and binding legal contract against the *Agra and Masterman's Bank*, in favour of the *Asiatic Banking Corporation*. The cases as to the offer of rewards, of which the case of *Williams* v. *Carwardine* (1) is an example, followed by the somewhat analogous cases of *Denton* v. *Great Northern Railway Company* (2), *Warlow* v. *Harrison* (3), and *Scott* v. *Pilkington* (4), appear to me to be sufficient authority to shew that there may be privity of contract in such a case; and if the view be adopted which appears to have been taken in the American Courts, that the holder of the letter of credit is the agent of the writer for the purpose of entering into such a contract, the same result would be arrived at by a different road.

But assuming the contract to have been at law a contract with *Dickson, Tatham, & Co.*, and with no other, it is clear that the contract was in equity assignable, and that *Dickson, Tatham, & Co.*, must be taken to have assigned (if assignment were needed) to the *Asiatic Banking Corporation*, and to have been by the writers of the letter intended to assign to them, the engagement in the letter providing for the acceptance of the bills. Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities. The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter, and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor, and without reference to any collateral or cross claims. Unless this is done, the letter is useless; *Dickson, Tatham, & Co.*, obtain no benefit from it; the takers of the bills obtain no protection under it. In this view of the case, the *Asiatic Banking Corporation* are, in my opinion, assignees of the contract with *Dickson, Tatham, & Co.*, free from any equities between *Dickson, Tatham, & Co.*, and the *Agra and Masterman's Bank*.

(1) 4 B. & Ad. 621.
(2) 5 E. & B. 860.
(3) 1 E. & E. 295, 309.
(4) 2 B. & S. 11.

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I think the claim should be allowed, and the *Asiatic Banking Corporation*, or their liquidators, should have their costs here and in the Court below out of the estate of the *Agra and Masterman's Bank*.

Solicitors for the Appellant: Messrs. *Freshfields & Newman.*
Solicitors for the Respondent: Messrs. *Uptons, Johnson, & Upton.*

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In re PENHALE AND LOMAX CONSOLIDATED SILVER LEAD MINING COMPANY.

Stannaries Court—Jurisdiction—Companies Act, 1862, *s.* 35—*Rectification of Register.*

The jurisdiction conferred by the 35th section of the *Companies Act*, 1862, to rectify the register of companies within the district of the Stannaries, does not exclude the jurisdiction of the superior Courts of common law and equity for the same purpose.

Decision of *Stuart*, V.C., reversed.

Where a company has been established for working mines within the district of the Stannaries, the fact that some of the objects of the company are to be carried out beyond the district does not exempt the company from the jurisdiction of the Stannaries Court.

THIS was an appeal from an order of Vice-Chancellor *Stuart*, made on the 18th of January, 1867, refusing an application by the Appellant, Mr. *Atter*, under the 35th section of the *Companies Act*, 1862 (1), to rectify the register of the *Penhale and Lomax Consolidated Silver Lead Mining Company, Limited*, by removing his name as the holder of any larger number of shares than sixty. The objects of the company, as stated in the memorandum of association, were as follows:—

1. The purchasing, or leasing, or otherwise acquiring, the beneficial interest in the mines and lands following, viz:—

(*a*). The mine workings and mining grounds known as the *Penhale Mine*, situate in the parish of *Perranzabuloe*, in the county of *Cornwall*. (*b*). The mine workings and mining grounds

(1) 25 & 26 Vict. c. 89.

known as the *Lomax Mine*, situate in the same parish of *Perranzabuloe*, at a price not exceeding £13,000, payable wholly in shares.

2. The purchasing, leasing, or otherwise acquiring and holding of any other lands, messuages, mines, and mineral rights in *Cornwall*.

3. The searching for ores, opening and working mines and mineral property in *Cornwall*.

4. The getting, purchasing, making merchantable, removing, and selling, ores and minerals.

5. The purchase and erection of stamping and crushing mills, smelting and refining works, with the necessary engines, plant, and machinery.

6. The stamping, crushing, smelting, and refining of ores and minerals.

7. The carrying on of the business of a mining, smelting, and refining company, and, as auxiliary thereto, the purchasing, chartering, or freighting of vessels; the purchase and erection of the necessary buildings; the construction of jetties or piers, roads, railways, or tramways; the purchase or hire of engines, waggons, railway plant, and machinery, live stock, or other stock, or plant of any description, incidental to, or that may be necessary for, the operation of the company.

8. The granting of licenses for mining in or under any lands held or acquired by the company; the leasing of any such lands for mining, agricultural, or building purposes; and the sale of any lands, mines, minerals, rights, and other property, which may be acquired by the company.

9. The doing of all such acts and things as shall be incidental or conducive to the aforesaid objects. But until the company, in accordance with their regulations, otherwise determine, their undertakings shall be confined within the properties first hereinbefore referred to.

The capital of the company was £45,000, the shares being £5 each. The company was registered at *Truro*, but the registered office was in *London*.

The ground upon which the Vice-Chancellor refused the application was, that the company was subject to the jurisdiction of the

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Stannaries Court, and that the application ought therefore to be made to the Vice-Warden of that Court.

Mr. *Dickinson*, Q.C., and Mr. *Brooksbank*, for the Appellant:—

In the first place we contend that the Vice-Warden of the Stannaries Court has no jurisdiction over this company, because its object is not confined to mining operations in *Cornwall*, but extends to crushing and smelting works, piers and railways, in other parts of the country, as well as to leasing lands for building and agricultural purposes. The 6 & 7 Will. 4, c. 106, which regulates the jurisdiction of the Stannaries Court, by the 4th section extends the jurisdiction to mines other than tin mines in *Cornwall* (which is extended to the Stannaries in *Devonshire* by the 18 & 19 Vict. c. 32); and the *Companies Act*, 1862, sect. 68, gives the Court the same jurisdiction over incorporated companies that it had before over unincorporated companies; but neither Act extends the jurisdiction to companies established for objects beyond the district of the Stannaries.

But if the Stannaries Court has jurisdiction, we contend that the jurisdiction of the Court of Chancery is not superseded thereby. In the former *Companies Act*, 19 & 20 Vict. c. 47, the 25th section, which corresponds to the 35th section in the present Act, makes no mention of the Stannaries Court. The claim of that Court to jurisdiction rests solely on the 35th section of the *Companies Act*, 1862 (1). The grammatical construction of that section gives no exclusive jurisdiction to the Vice-Warden, but only gives an option to the applicant to proceed either in the superior Courts of law or

(1) The 35th section, so far as it is material, is as follows: "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved, or any member of the company, or the company itself, may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's superior Courts of law or equity, or by application to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries in the case of companies subject to his jurisdiction, and as respects companies registered in *Scotland* by summary petition to the Court of Session, or in such other manner as the said Courts may direct, apply for an order of the Court that the register may be rectified."

equity, or in the Stannaries Court. The case of companies registered in *Scotland* is mentioned in a different sentence, and is placed on a different footing. It is true that the 81st section (1) appears to give exclusive jurisdiction, in winding up, to the Stannaries Court; but the reason for that provision is that local knowledge and local machinery would be necessary to wind up the affairs of a mining company: *In re East Botallack Mining Company* (2). In the case of rectifying the register no such peculiar knowledge is necessary.

In the part of the *Companies Act*, 1862, which refers to the winding-up of companies, special provisions are made regulating the proceedings of the Stannaries Court, and a power of appeal is given (3); but there are no such provisions connected with the 35th section.

SIR G. J. TURNER, L.J.:—

We are of opinion that as this company was established for working mines in *Cornwall*, it must come within the jurisdiction of the Vice-Warden of the Stannaries Court, at least so far as it relates to the mines. We need not, therefore, trouble the counsel for the Respondents on that point. The only question is, whether the jurisdiction of the Court of Chancery is excluded.

LORD CAIRNS, L.J.:—

I think it is clear that the Vice-Warden has jurisdiction in the case; the only question is, whether he has exclusive jurisdiction.

Mr. *Southgate*, Q.C., and Mr. *Everitt*, for the company:—

This is not a company registered in *England* within the mean-

(1) The 81st section enacts as follows: "The expression 'the Court,' as used in this part of this Act, shall mean the following authorities, that is to say: In the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries, the Court of the Vice-Warden of the Stannaries, unless the Vice-Warden certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery, in which case 'the Court' shall mean the High Court of Chancery; in the case of a company registered in *England* that is not engaged in working any such mine as aforesaid, the High Court of Chancery; in the case of a company registered in *Ireland*, the Court of Chancery in *Ireland*; in all cases of companies registered in *Scotland*, the Court of Session in either division thereof."

(2) 13 W. R. 197, 10 Jur. N.S. 1193. 36 Beav. 82

(3) Sect. 124.

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ing of the 35th section; the district of the Stannaries is considered out of *England* for the purposes of that section. Many of the mining companies are very small, and the knowledge required for determining the rights of the parties is very technical and local. There would be great inconvenience in removing such questions to the superior Courts in *London*.

There was no occasion for any special provisions as to appeals. Every order of the Vice-Warden must be either on the common law or on the equity side of the Court; and in both cases a power of appeal is given by the *Stannaries Jurisdiction Act* (1).

SIR G. J. TURNER, L.J.:—

We have already expressed our opinion that the Court of Stannaries has jurisdiction; the only question now for decision is whether such jurisdiction is exclusive or not. The whole question in the case depends on the words of the first part of the 35th section of the *Companies Act*, 1862, which are these:—[His Lordship read the clause.] Now that portion of the section which we have to consider is divided into two parts: the first of which relates to the companies to which the section is to apply, the second to the Courts to which application is to be made.

First, as to the companies: they are defined to be companies registered in *England* or *Ireland*. It is impossible to say that this is not a company registered in *England;* therefore it is clearly within the scope of this part of the section. The Legislature then proceeds to define the Courts to which application may be made; and provides that it may be made "in any of the superior Courts of common law or equity, or to a Judge sitting in Chambers, or to the Vice-Warden of the Stannaries, in the case of companies subject to his jurisdiction." There are, then, three ways in which application may be made in the case of companies registered in *England* or *Ireland;* and why should it be supposed that the Legislature intended the application to be made of necessity to the Vice-Warden, when we have the alternative word "or," which introduces that clause of the sentence? When it was intended that the application should be made to only one Court, the Legis-

(1) 18 & 19 Vict. c. 32, s. 26.

lature has so provided by introducing a new arrangement of the sentence; for it proceeds to say:—"And as respects companies registered in *Scotland*, by summary petition to the Court of the Sessions." There is no such provision in the case of companies subject to the jurisdiction of the Stannaries Court. If it had been intended in their case to exclude the superior Courts of law and equity—and very plain words would have been necessary for that purpose—the sentence would have been framed in a different form; it would have been "and as to companies subject to the Stannaries Court, it is to be made to the Vice-Warden," as is said in the case of *Scotland*.

It therefore seems to me, upon the language of the section, reasonably clear that it was intended that as to the Stannaries there was to be an alternative right to apply either to the Vice-Warden or to the superior Courts of law or equity. We now simply decide the question of jurisdiction, leaving the merits of the case for subsequent decision.

LORD CAIRNS, L.J.:—

It appears to me that in this case the company is clearly within the jurisdiction of the Vice-Warden of the Stannaries Court; and the question is, whether the application can also be made in the Court of Chancery. In determining this, there are some important preliminary considerations before we come to the language of the section. In the first place, the object of the clause was to redress a wrong of a very peculiar kind, to remedy the consequence of a wrong name being on the register: and the Legislature seems to have thought that this was a wrong which ought to be remedied in the shortest possible time, and to have wished to open as many doors as possible, so that the injured party might have no doubt or difficulty in finding means of redress.

Secondly; as to all English companies, the office of registration of joint stock companies is in *London*, and many of the registered offices of the companies subject to the Stannaries Court are in *London*. If it were a question requiring local knowledge, or local evidence, I could understand the expediency of its being sent to *Cornwall* for the decision of the Vice-Warden, but it is difficult to say why such a question as the rectification of the register cannot

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be equally well decided in *London*. The 81st section stands on a wholly different footing. In the winding-up, questions may arise which may render it very proper that the case should be placed under the jurisdiction of the Stannaries Court, where there are means of peculiar knowledge; but here there is no such necessity.

These considerations, however, are only preliminary to the consideration, and must yield to the construction, of the section on which the question must ultimately turn. But I think that there is no doubt as to the construction of the section. The words are, "the person aggrieved may, as respects companies registered in *England* or *Ireland*, by motion in any of Her Majesty's superior Courts of common law or equity, apply for an Order of the Court, that the register may be rectified." That is an independent provision. Does the company come within those words? There can be no doubt that it does. Why, then, should the Appellant lose the benefit of them? Are there words taking away the right given to him? The expression used is "or to the Vice-Warden of the Stannaries Court," and the introductory word "or" shews that there is an alternative right of application. This, the grammatical construction, would be sufficient to determine the question if there was nothing else to assist us; but the 81st section entirely reverses the arrangement of the words, and puts the right of application to the Stannaries Court first, and the larger alternative afterwards, making the grammatical construction give exclusive jurisdiction to the Stannaries Court, just as, I think, in the other section it gives it only concurrent jurisdiction.

The order of the Vice-Chancellor must be discharged as to jurisdiction. The parties are at liberty to go into fresh evidence as to the merits.

Solicitor for the Appellant: Mr. *Pulbrook*.
Solicitor for the Company: Mr. *W. Compton Smith*.

CARDIFF PRESERVED COAL AND COKE COMPANY *v.* NORTON.

L. C.
1867
Jan. 23, 24, 25; Feb. 7.

Winding-up—Joint Stock Companies Act, 1856—21 & 22 *Vict. c.* 60, *s.* 11—*Transfer of Assets—Shareholders—Jurisdiction.*

When a company is being wound up under the *Joint Stock Companies Act*, 1856, the proper mode of recovering its assets in the hands of contributories is by a proceeding under the winding-up, and not by a suit, jurisdiction being given by 21 & 22 Vict. c. 60, s. 11.

The *A.* company, a limited company, with all its shares fully paid up, sold its business and property to the *B.* company, and, as part of the consideration, 950 shares in the *B.* company were divided among the shareholders of the *A.* company. The *A.* company was afterwards ordered to be wound up in the Court of Bankruptcy:—

Held (affirming the decision of the Master of the Rolls), that the *A.* company and its official liquidators could not maintain a suit in equity against the shareholders who had been placed upon the list of contributories to have the 950 shares in the *B.* company transferred to the official liquidators as assets of the *A.* company.

A winding-up order under the *Joint Stock Companies Act*, 1856, is not invalid because founded on neglect to pay on a demand of the petitioning creditor in excess of what was actually due to him.

THIS was an appeal from an order of the Master of the Rolls, dismissing the bill in this suit.

The *Cardiff Preserved Coal and Coke Company, Limited*, was a limited company, formed under the Act of 1856, and had 1900 shareholders, the shares being of £5 each, all fully paid. In 1860 the *Cardiff Company* sold their goodwill, stock in trade, &c., to the *Crown Preserved Coal Company*, on the following terms:—The purchase-money was £6500, in payment of which, 950 £5 shares, fully paid up, in the *Crown Company*, equivalent to £4750, were transferred to *Ommanney*, a trustee for the shareholders in the *Cardiff Company*, and the *Crown Company* undertook to pay the debts of the *Cardiff Company* to an amount not exceeding £1750. The 950 shares in the *Crown Company* were then distributed rateably amongst the shareholders in the *Cardiff Company*, who were registered as shareholders in the *Crown Company*, but the £1750 was not sufficient to pay the debts of the *Cardiff Company*, and

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Thomas Hill, a shareholder and creditor, claimed a debt of £628 as due to him. This not being paid, he obtained an order in the *Bristol* District Court of Bankruptcy for winding-up the *Cardiff Company*, and he and one *Miller* were appointed official liquidators. Various proceedings took place under the winding-up, and the amount found due to *Hill* was settled at £411. The shareholders were made contributories, and a call was made of 7*s.* 6*d.* a share, which was discharged by the Lord Chancellor, on the ground that the shares were fully paid up.

Hill therefore filed the bill in this suit in the names of the *Cardiff Company* and of the liquidators, against all the contributories, except himself, and against the *Crown Company*, praying that it might be declared that the 950 shares in the *Crown Company* were assets for the payment of his debt and of the costs. Some of the contributories compromised with *Hill*, but others resisted, and the Master of the Rolls dismissed the bill on the hearing, as reported (1), where the facts of the case are more fully set out.

The Plaintiffs appealed.

Mr. *Selwyn*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Babington*, for the Appellants, besides the arguments used in the Court below, contended that such a transaction as this sale might be a gross fraud upon the creditors. The property was liable to the debts, and how could the shareholders, who took the proceeds of the sale, avoid the liability? In the case of a limited company there was no claim against the person, and could the company be allowed to transfer their assets and then tell the creditor that he has nothing against which to issue execution, and no personal remedy? Of course, if the assets were lost or squandered, the creditor would have no remedy, but that was not the case here. Suppose the shareholders had sold the assets and had received money for them, could they then defy the creditors? The Plaintiff must be paid in some way, and this was the proper way to reach these shareholders.

Mr. *Cole*, Q.C., and Mr. *Pearson*, Q.C., for the Defendants, used similar arguments to those used by them in the Court below.

(1) Law Rep. 2 Eq. 558.

Mr. *Lindley*, for the Defendant *Ommanney*.

Mr. *Currey*, for the *Crown Company*.

Mr. *Roxburgh*, in reply.

Feb. 7. LORD CHELMSFORD, L.C., after stating the facts of the case, and the grounds of the judgment of the Master of the Rolls, continued:—

Upon the argument of the appeal it was insisted on the part of the Plaintiffs that the *Crown Company's* shares in the possession of the shareholders of the *Cardiff Company* were part of the assets of the latter company, and that the Commissioner had no power to order the contributories to deliver up the shares to the official liquidators, any more than he could order property of a bankrupt in the hands of a third person to be delivered up, the shareholders being, with respect to the possession of the assets of the company, in the same situation as strangers.

On the part of the Defendants it was said that, under the *Joint Stock Companies Acts*, although the Court of Bankruptcy may have no power to compel the delivery up of property of a company which is being wound up in the hands of persons unconnected with the company, it has that power over contributories.

Upon a short examination of the Acts in question this will appear to be correct.

I do not think that the *Joint Stock Companies Act*, 1856, itself gives the power contended for. It is not to be found in the 60th and the 77th sections, which were referred to for this purpose. The 60th section merely gives the Court in which any company is being wound up the same power of enforcing its orders as the Court of Chancery has, and although the 77th section gives power to the Court, after it has made an order for winding up the company, to summon before it any person known or suspected to have in his possession any of the estate or effects of the company, yet it nowhere authorizes the Court to possess itself of the property which may be found to be in the hands of such person. But, under an earlier *Winding-up Act*, 11 & 12 Vict. c. 45 (at a time

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when Masters in Chancery existed), by the 66th section it is enacted "That the Master shall, from time to time, by order to be made upon the application of the official manager or of any contributory, order and require any contributory to pay, deliver, or transfer into the hands of the official manager any sum or balance, books, papers, estate, or effects, which shall happen to be in his hands for the time being, and to which the company is *primâ facie* entitled." It is quite true, as was stated in argument, that it is expressly provided that this Act shall not apply to companies registered under the *Joint Stock Companies Act*, 1856. But by the 21 & 22 Vict. c. 60, an Act to amend (amongst others) the *Joint Stock Companies Act*, 1856, the 11th section enacts "That the practice hitherto in use in the Court of Chancery in winding up companies under the *Joint Stock Companies Winding-up Act*, 1848" (11 & 12 Vict. c. 45), "and the *Joint Stock Companies Winding-up Act*, 1849 . . . and all powers and jurisdictions given to the Court of Chancery by the said Acts, and not conferred by the *Joint Stock Companies Acts*, shall be applicable to the winding-up, under the said *Joint Stock Companies Acts*, of companies by the Court of Chancery and Courts of Bankruptcy, until rules for regulating such winding-up are made in pursuance of the powers for that purpose given by the *Joint Stock Companies Acts*, and the Courts of Chancery and Courts of Bankruptcy may adopt such practice, powers, and jurisdictions, to the same extent as if the companies were being wound up under the *Joint Stock Companies Winding-up Act*, 1848, and the *Joint Stock Companies Winding-up Act*, 1849."

It was said, on the part of the Plaintiffs, that this section relates merely to practice or mode of procedure. But what is the meaning of the words "powers" and "jurisdictions" following the word "practice"? If the company was being wound up under the *Joint Stock Companies Act*, 1848, would not the Master have had power to order a contributory to deliver up any of the estate or effects of the company in his possession? and as the Court of Bankruptcy may adopt the "powers and jurisdictions" to the same extent as if the company were being wound up under that Act, it seems clear that the Commissioner has the same control over a contributory to compel him to deliver to the official liquidators any assets of the company of which he is in possession.

The Master of the Rolls was therefore right in holding that the contributories are subject to the jurisdiction of the Court in bankruptcy, and consequently in dismissing the bill.

I might content myself with disposing of the appeal upon this ground, but questions were raised in argument as to the liability of the shareholders of the *Cardiff Company* in respect of their possession of the shares of the *Crown Company*, upon which a decision may possibly prevent further litigation.

The first question is whether the 950 shares in the *Crown Company* can in any manner be regarded as part of the assets of the *Cardiff Company?* This is, of course, a perfectly distinct question from that which was incidentally mentioned by Lord *Westbury* upon the appeal against the order for a call upon the contributories, whether the shares taken in the *Crown Company* for the paid-up shares in the *Cardiff Company, Limited*, could be considered as a return of the capital of the shareholders in that company. From the first opening of the case I felt at a loss to understand how the shares in the *Crown Company* could ever be considered to be part of the assets of the *Cardiff Company*. The agreement between the two companies was either valid or invalid. If invalid there was no transfer at all of the concern of the *Cardiff Company*, and the shareholders in that company remained the proprietors of their fully paid-up shares. If the agreement was good and valid, what was there to prevent the *Cardiff Company* from agreeing that the shareholders, who were to be deprived of their original shares which they had fully paid up, should receive some part of the consideration for the transfer of a concern in which they were substantially interested? This they clearly did by the deed of the 27th of October, 1860, and the 950 shares were never in the possession of the company for one moment, but were delivered to Mr. *Ommanney* as the property and for the sole benefit of the shareholders. There seems to me to be no more reason why the official liquidators should demand these shares from the shareholders as belonging to the company, than why they should follow the property of the *Cardiff Company*, transferred to and in the possession of the *Crown Company*. Could the *Cardiff Company* have claimed these shares from the shareholders as being their property against their own deed? And what better right can the official

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liquidators have? If there had been any colourable contrivance for the purpose of withdrawing the property of the company from claims to which it might be rendered available, I can understand that although the parties themselves might be bound by their acts, yet that the transaction might be impeached in favour of creditors. But it has never been contended that the deed was not perfectly *bonâ fide*, and if the company could not have set it aside, or have asserted a right to property which they expressly agreed should belong to their shareholders, how can the official liquidators, who are to bring actions or suits in the name and on behalf of the company, claim the property as belonging to the company against their own deed?

There were some minor points argued which may deserve a short notice.

It was contended that the winding-up order was bad because Mr. *Hill* had demanded a sum of £628, and it appeared that he was entitled only to £411 7*s.* 9*d.*; and the 67th and 68th sections of the Act make a company liable to be wound up only when a demand is made of a certain sum, and the company neglect to pay such sum, which in this case they were not bound to pay. But the liability of a company to be wound up under these provisions arises when a creditor, to whom the company is indebted above £50, serves a demand requiring the company to pay the sum so due, and the company for a certain time neglect to pay such sum. In this case there was a debt of more than £50 due to Mr. *Hill*. He made, it is true, a demand upon the company for payment of more than was due, but of course the amount due was known to the company, and was included in the demand, and the company neglected to pay "such sum," which means not the sum demanded, but the sum due, which they might have paid, and so have prevented the order being made. The construction contended for would make every winding-up order bad where the creditor had demanded the smallest sum above what was actually due to him.

It was also said that if the 950 shares were the assets of the company, they ought to have been all transferred to the official liquidators, in order that complete justice should be done to all the shareholders who would be entitled to a distribution of the surplus of the proceeds of the shares after paying the debts of the company,

and that the Plaintiff *Hill* had effectually prevented this by consenting to the dismissal of the bill as to some of the Defendants and compromising with others. I think, if this had been a case proper to be dealt with in equity, the proceedings of *Hill* might have raised a question whether he had not deprived himself of his right to the relief which he seeks by his dealing with the shares, alleged by him to be the property of the company, more with regard to his interest as sole creditor than to his duty as official liquidator. But as I agree with the Master of the Rolls, that the Plaintiffs have unnecessarily resorted to a Court of Equity instead of invoking the powers of the Court of Bankruptcy, which, if they are entitled to what they here demand, could have given it to them, I forbear to make any further observation upon this objection to granting the prayer of the bill.

The decree of the Master of the Rolls must be affirmed, and the Petition of appeal dismissed with costs.

Solicitors for the Plaintiffs: Messrs. *Marshall, Westall, & Roberts.*
Solicitors for the Defendants: Messrs. *J. & W. W. Flower.*
Solicitor for the *Crown Company*: Mr. *C. Gatliff.*

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March 4, 5,
6, 22.

In re CACHAR COMPANY.

LAWRENCE'S CASE.

In re RUSSIAN (VYKSOUNSKY) IRON WORKS COMPANY.

KINCAID'S CASE.

Companies Act, 1862—*Rectification of Register—Variance between Prospectus and Memorandum—Delay.*

L., on the faith of a prospectus, applied, on the 4th of September, 1865, for shares in a company not yet registered. It was registered on the 11th of September, 1865, under a memorandum differing materially from the prospectus. On the 7th of October, 1865, shares were allotted to *L.*, and on the 14th of October he paid upon them the sum payable on allotment. On the 14th of May, 1866, he was supplied with copies of the memorandum and articles, the contents of which he had not known until that time, and on the 16th he laid them before his solicitor, who advised him as to his position. On the 27th of September, 1866, he, for the first time, gave the company notice that he repudiated his shares:—

Held (affirming the decision of *Wood*, V.C.), that the delay which had taken place since the 16th of May, 1866, was sufficient to deprive *L.* of any right which he had on that day to repudiate his shares on the ground of the variance between the prospectus and memorandum.

Held, by Lord *Cairns*, L.J., that *L.* had not, on the 16th of May, 1866, any right of repudiation, for that, at the expiration of a reasonable time after the registration of the company, he must be held either to have acquainted himself with the memorandum and articles, or to have been content to waive any examination of them; and, *semble*, that such reasonable time had expired at the time when *L.* made the payment of the 14th of October, 1865.

K. applied for shares on the 18th of April, 1865, in a company which was registered on the 28th of April, under a memorandum differing from the prospectus. On the 29th of April shares were allotted to him, and on the 11th of May he paid the balance of the deposit. On the 25th of April, 1866, he also made a payment on account of a call in respect of the shares; at which time he alleged that he was ignorant of the contents of the memorandum of association. On the 17th of July he applied to have his name removed from the register:—

Held (reversing the decision of *Wood*, V.C.), that the delay which had taken place had deprived *K.* of his right to relief.

LAWRENCE'S CASE.

THIS was an appeal, by Mr. *Lawrence*, from an order of Vice-Chancellor *Wood*, refusing to rectify the register of the *Cachar Company, Limited*, by removing his name from it.

Previously to the registration of the company, a prospectus had been issued, which explained the objects of the company in the following terms:—

"This company is formed for the purchase of certain valuable and well-known estates, situate in the *Cachar* districts, consisting of 44,000 acres, more or less. These estates, with their plantations, are all in the best part of the tea district, and are admirably situated with respect to land and water carriage, and also with respect to local labour. The cultivated portions, about 3,700 acres, consist of the *Appin* and *Lalla*, *Dilkoosha*, *Dickseea*, *Laassingleh*, *Luckeepore*, *Putteemara*, *Sylhet*, *Kistiepore*, and other gardens.

"The estates, with the exception of a small portion which is freehold, are held direct from Government for ninety-nine years under the old rules of land tenure, convertible at any time, at a small cost, into freehold.

"From the reports of Messrs. *Sandeman, Davis, & Stewart*, it appears there are 3450 acres under plant, of the following growth, viz.:—

321	acres of	5 years'	growth and upwards,
310	„	4 years'	growth,
1218	„	3	„
991	„	2	„
610	„	1	„

And in nurseries upwards of 2,000,000 seedlings, sufficient to plant from 500 to 600 acres.

"The statement of the age of the plants, and of the area under cultivation, is believed to be substantially correct, but to guard against any error, it is agreed that compensation shall be made by the vendor for any deficiency which may exist in the statement of the age of the plants, or of the area under cultivation, the company, on the other hand, paying an equivalent for any excess.

"The vendor has entered into a contract for the sale to this company, in consideration of the sum of £300,000, of the whole of these estates, together with all buildings, implements, stock in trade, and unexpired contracts for labour. The purchase-money has been arranged to be paid to the vendor as follows: £25,000

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on allotment, £45,000 on approval of title, £80,000 on the completion of the purchase, by acceptances maturing in June next. The residue in debenture bonds for £150,000; £50,000 due in three years, £50,000 in five years, and £50,000 in seven years.

"The vendor has agreed to make over to the company the whole of the crops for the current season free of cost, and guarantees to the shareholders a dividend of 15 per cent. on the paid-up capital to the 31st of December of this year, and further guarantees a sum of £15,000 as the minimum value of this season's crop.

"The directors estimate that from a fair average yield of tea from these estates, the future dividends of the company will not fall below 15 per cent. per annum."

On the 4th of September, 1865, Mr. *Lawrence*, having seen the prospectus, which was handed to him by Mr. *Knight*, a broker employed by the company, sent in, through the brokers named in the prospectus, an application for 2000 shares in the usual form, agreeing to accept the same, or any less number that might be allotted him, and authorizing the directors to put him on the register for the shares allotted, paying at the same time the required deposit of 10*s.* per share. Previous to Mr. *Lawrence's* seeing the prospectus, there had been some correspondence between him and Mr. *Knight*, in which Mr. *Lawrence* expressed an intention to take shares, but it is not considered necessary to enter into the details.

The company was registered on the 11th of September, 1865, with a memorandum which defined its objects as follows:—

"The purchase and holding, on lease, in fee, or otherwise, of lands in the province of *Cachar*, *Eastern India*, and elsewhere in *India*; the cultivation thereof for tea plants and otherwise, and the growth of tea thereon; the manufacture of tea and the sale thereof; and generally, the performance of all such acts, matters, and things as are incidental or otherwise conducive to the attainment of the before mentioned objects, or any of them."

On the 7th of October, 1865, Mr. *Lawrence* received a letter of allotment of 2000 shares, and on the 14th of the same month paid the 10*s.* per share which was payable on allotment, giving up his letter of allotment in exchange for the bankers' receipt, which

receipt acknowledged his title to, and promised delivery of the certificates for, the 2000 shares. From this time till the 14th of May, 1866, nothing passed between Mr. *Lawrence* and the company. He positively deposed that until the 14th of May, 1866, he had never seen the memorandum or articles, nor had any knowledge of their contents.

On the 14th of May, 1866, Mr. *Trevor Lawrence*, a son of Mr. *Lawrence*, not being himself a shareholder, but acting on behalf of his father, called at the office of the company, had some conversation with the secretary about its affairs, and took away with him a copy of the memorandum and articles, and of the contract with the vendor of the estates which were to be purchased by the company.

On the 16th of May, he laid these documents before his father's solicitor, stating that he had received information that the promoters would abandon the undertaking and return the deposits. The solicitor deposed that subsequently, and in the same month, he explained to Mr. *Lawrence* what his position was with reference to the company, and advised him that he was not liable in respect of the shares allotted to him, but that as he (the solicitor) understood from Mr. *T. Lawrence*, and believed it to be the fact, that negotiations were pending for an abandonment of the undertaking, and a return of the deposits, he advised Mr. *Lawrence* that he might properly abstain from taking proceedings to get his name removed from the register until the result of the negotiations was ascertained.

On the 23rd of May, an interview took place between Mr. *Lawrence's* solicitor and the solicitors of the company. Mr. *Lawrence's* solicitor, and one of the solicitors of the company, gave evidence as to what passed at this interview. Their accounts differed very materially, Mr. *Lawrence's* solicitor deposing that he insisted on Mr. *Lawrence's* right to repudiate his shares, and stated that he was abstaining from hostile proceedings only until the result of the negotiations, which he understood to be pending, was ascertained; the solicitor for the company, on the other hand, denying that anything of that kind was said, and deposing that Mr. *Lawrence's* solicitor had urged on behalf of Mr. *Lawrence*, and another large shareholder, the propriety of winding up the company. He

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further deposed that it was not known to the company that Mr. *Lawrence* intended to repudiate his liability, until the letter of the 27th of September, mentioned below. The Lord Justice Lord *Cairns* came to the conclusion that the recollection of the company's solicitor was more accurate than that of Mr. *Lawrence's* solicitor, and that the latter, at the above interview, had, on behalf of his clients, urged on the directors, through their solicitor, the winding up of the company.

On the 1st and 7th of June, 1866, Mr. *Trevor Lawrence* again went to the company's offices, and it was deposed by the secretary that he saw the board of directors, and said to them "that his father, and other influential shareholders, were desirous, by some means or other, of getting out of the company at all hazards, and did not wish any further steps to be taken," or used words to that effect.

On the 12th of June, 1866, an extraordinary general meeting of shareholders was held, at which Mr. *Trevor Lawrence* attended, on behalf of his father, and was allowed to remain throughout the proceedings. At this meeting one of the shareholders alluded pointedly to an important variance between the prospectus and the articles. A committee of investigation into the affairs of the company was appointed at this meeting.

On the 24th of September, 1866, Mr. *Lawrence* received a circular, stating that a call of 10*s.* per share had been made on the 20th of that month, and requiring payment of it. On the 27th, Mr. *Lawrence's* solicitors sent to the company a letter, giving them formal notice that Mr. *Lawrence* denied being a shareholder, and repudiated all liability in respect of the shares, and would, in due course, serve the company with notice of motion, for the first seal of the ensuing term, to have his name taken off the register.

Vice-Chancellor *Wood* refused the motion, on the ground of delay; and Mr. *Lawrence* now appealed.

Sir *Roundell Palmer*, Q.C., and Mr. *Waller*, for the Appellant:—

Where a contract is simply voidable, the party electing to avoid it must, no doubt, make known his intention as soon as he knows of its defect; otherwise he is bound. But in a case like the present we submit that there is no contract at all. When a

person applies for shares in an existing company, and they are allotted to him, there is a contract, though it may be voidable; but if a person applies for shares in a non-existing company, advertised as having particular objects, and shares are allotted him in a company having quite different objects, there is no contract at all. The distinction is shewn by *Ex parte Briggs* (1), and the judgment of Vice-Chancellor *Wood* in *Stewart's Case* (2). The latter case governs the present. *Lawrence* applied for shares on the faith of the prospectus, and *Knight* had no power to bind him as agent. The making an allotment on the footing of the application amounted to a representation that the company established was such a one as had been advertised; but it amounts to no acceptance of a proposal to take shares of a different description, though such a contract may grow out of it by acquiescence founded on knowledge.

[The LORD JUSTICE LORD CAIRNS:—How far do you carry that? Every company has, in its articles, a number of provisions not contained in the original prospectus.]

Where the additional terms are such as flow out of the original contract, there is no departure from the contract, any more than in the case of a purchase of an estate, which involves a great deal not expressly provided for in the contract. As to delay, it was urged in vain, in *Stewart's Case*, that he ought to be held cognizant of the memorandum and articles long before the time of his application to be relieved, he having been a shareholder for thirteen months; but the Court held that he was entitled to go on believing what had been told him without looking at the memorandum and articles.

[The LORD JUSTICE LORD CAIRNS:—It is difficult to disembarrass these cases of the effect which a man's name being on the register has in inducing other persons to alter their position.]

There is great force, no doubt, in that argument, but in *Stewart's Case* it did not prevail. We are completely covered by that case, down to May, 1866.

(1) Law Rep. 1 Eq. 483.

(2) Law Rep. 1 Ch. 574.

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[The LORD JUSTICE LORD CAIRNS:—If the memorandum is in existence, and referred to in the prospectus, the applicant cannot rely on a mis-statement of it in the prospectus, as a ground for repudiating the shares: *Kisch* v. *Central Railway Company of Venezuela* (1). When the memorandum is not in existence, he must have a reasonable time to look at it; but after that time has elapsed why should he be in a better position than if it had existed when he applied for shares?]

Because the allotment to him is a representation by the company that they are giving him what he has applied for.

[The LORD JUSTICE LORD CAIRNS:—In the cases relating to contracts by correspondence, if the parties have not contracted *ad idem*, neither is bound. Here the company is bound by the allotment; and the danger of your doctrine is, that it gives allottees an opportunity of playing fast and loose.]

The objection of the want of mutuality did not avail the shareholders in *Spackman's Case* (2), for there the shareholder who was fixed as contributory could never have claimed to participate in profits. It is clear, even on the evidence of the other side, that *Lawrence*, in May, 1866, declared his intention to get clear of the company in any way he could; and after this a delay of four months, during which there was a negotiation going on as to discontinuing the company, cannot bar the right to relief. The reasoning of the Vice-Chancellor's judgment is not, as we submit, satisfactory. There was nothing in the nature of playing fast and loose. As to agency, it is difficult to follow the reasoning.

[The LORD JUSTICE LORD CAIRNS:—May not one view be, that the application made the directors the applicant's agents to put his name on the register? If they exceeded their authority, he might affirm or dis-affirm their act. If he made no objection, he must be held to have affirmed it.]

They were not agents, for they were under no obligation to give the applicant shares. There was nothing beyond a bare authority to put down the applicant's name as a shareholder when a com-

(1) 3 D. J. & S. 122. (2) 34 L. J. (Ch.) 321,

pany answering the description in the prospectus was formed: and none such ever was formed, so the authority never arose.

Mr. *G. M. Giffard*, Q.C., and Mr. *Rogers*, for the company :—

We say that *Lawrence* is bound by the acts of *Knight*, as his agent. He exercised no discretion as to the nature of the company, but referred the matter to *Knight;* and the prospectus was not his inducement to take shares. But even if he went upon his own judgment, according to what was in the prospectus, we say there is no such variance from the prospectus as to entitle him to be discharged. It would be going too far to say that promoters cannot, in the least degree, extend the objects as defined in the prospectus, though the extensions are such as to involve nothing inconsistent with the prospectus. But, assuming the Court to be against us on these points, the delay is fatal to the application. *Lawrence* must be taken to have known that the company would be registered soon after his application for shares, and he ought to be taken to have known the contents of the memorandum and articles within a reasonable time. How long is a man to be allowed to go on professing ignorance of the constitution of the company, and retaining a right to back out of the company if it turns out unprosperous, while other people are going on taking shares on the faith of his being on the register? But, at all events, on the 16th of May *Lawrence* had actual knowledge of the circumstances on which he now relies; yet he never repudiated his shares, but negotiated about retiring from the company, on the footing of his being a member who wished to retire. He cannot, after this lapse of time, assert a right to repudiate. The argument that there was no contract is an extraordinary one. There was a contract, voidable it may be, but certainly not void. It is like a contract impeachable for fraud, which is voidable at the option of the party defrauded. The Appellant's counsel will not venture to maintain that Mr. *Lawrence* could not, on the 16th of May, have insisted upon remaining a shareholder; and if he could, there is an end of the contention that the contract was void.

Sir *Roundell Palmer*, in reply.

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KINCAID'S CASE.

THIS was an appeal by the *Russian (Vyksounsky) Ironworks Company, Limited*, from an order of Vice-Chancellor *Wood*, removing from the register of shareholders the name of Mr. *Joseph Kincaid*, in respect of forty shares in the company.

The facts relating to the establishment of the company are stated in the report of *Stewart's Case* (1), in which case it was held that there was a substantial variance between the memorandum of association and the prospectus, and Mr. *Stewart's* name was removed from the register.

The special facts relating to the case of Mr. *Kincaid* were as follows:—On the 18th of April, 1865, Mr. *Kincaid*, who was resident at *Dublin*, made an application for fifty shares in the regular form, and paid £50, being a deposit of £1 on each share applied for. The company having been registered on the 28th of April, 1865, an allotment was made to Mr. *Kincaid* on the following day of forty shares. On the 11th of May he paid £150, being the balance of £5 per share on the allotment of the forty shares; and on the 25th of April, 1866, he paid the sum of £50, being £1 5*s*. per share in respect of the first instalment of the first call.

The order on appeal in *Stewart's Case* having been made on the 17th of July, 1866, several of the shareholders applied, under the 35th section of the *Companies Act*, 1862, to have their names removed from the register, and, among others, Mr. *Kincaid*, whose application was made on the 18th of July, and was not opposed by the company. But Mr. *Kincaid* having brought an action against the company for the money which he had paid in respect of his shares, the company appealed from the order of the Vice-Chancellor.

In the affidavit filed by Mr. *Kincaid* in support of his application, he stated as follows: "I have never seen or read the said memorandum and articles of association, or either of them, or any part thereof;" and, after stating the payments which he had made in respect of his shares, he proceeded to say, "I made such payments in entire ignorance of the contents of the memorandum and articles of association, and upon the faith that such memoran-

(1) Law Rep. 1 Ch. 574.

dum and articles of association were in accordance with the said prospectus."

Under these circumstances it was contended, on behalf of the company, that Mr. *Kincaid* had not shewn sufficient diligence in asserting his rights to entitle him to relief on the ground of the variance between the prospectus and the memorandum of association.

The arguments urged by counsel on this point were substantially the same as those used in *Lawrence's Case.*

Mr. *Karslake,* Q.C., and Mr. *Gill,* appeared for the company, and referred to the following authorities: *Kisch* v. *Central Railway Company of Venezuela* (1); *Jones* v. *Smith* (2); *New Brunswick and Canada Railway Company* v. *Conybeare* (3); *Clarke* v. *Dickson* (4); *Vane* v. *Cobbold* (5); *Pulsford* v. *Richards* (6); *Macbride* v. *Lindsay* (7).

Mr. *G. M. Giffard,* Q.C., and Mr. *Caldecott,* for Mr. *Kincaid,* cited *Ship's Case* (8); *Pickard* v. *Sears* (9); *Chapman and Barker's Case* (10).

Mr. *Karslake,* in reply.

March 22. This day their Lordships delivered judgment in both the above cases, as follows:—

LAWRENCE'S CASE.

LORD CAIRNS, L.J.:—

The memorandum of association of this company was registered, and the incorporation of the company completed, on the 11th of September, 1865. Prior to this a prospectus stating the objects of the company, its capital, and the names of directors and officers, was circulated by the promoters, and in the month of July, 1865,

(1) 3 D. J. & S. 122.
(2) 7 Hare, 43.
(3) 9 H. L. C. 711.
(4) E. B. & E. 148.
(5) 1 Ex. 798.
(6) 17 Beav. 87.
(7) 9 Hare, 574.
(8) 2 D. J. & S. 544.
(9) 6 Ad. & E. 469.
(10) Law Rep. 3 Eq. 361.

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was handed by Mr. *Knight*, a broker employed by the promoters, to the Appellant, Mr. *Lawrence*. It was attempted to be said that the shares applied for by Mr. *Lawrence* were not applied for on the faith of this prospectus, or, in other words, that Mr. *Lawrence*, in applying for shares, was not influenced by any of the statements contained in this prospectus. It would be for those who assert this to establish the fact, and to establish it beyond any possibility of doubt, and I am of opinion that the evidence adduced, consisting of letters written to Mr. *Knight* by Mr. *Lawrence* before the prospectus was handed to him, and in which he expresses a desire, or an intention, to obtain shares in this company, is wholly insufficient for this purpose.

The next question is, does the memorandum of association accord with the prospectus, or is there between them such a variance as, supposing an objection to be made in proper time and form, would entitle any one applying for shares on the basis of the prospectus to refuse shares in a company governed by the memorandum? This question must also, in my opinion, be determined in Mr. *Lawrence's* favour. The prospectus contemplates the formation of a company to work certain specified tea estates, of a specified area, tenure, and capacity, acquired upon certain terms, under a particular contract; and it argues on the probability of profit from the definite and ascertained character of the undertaking. The memorandum of association would clearly embrace the undertaking thus described in the prospectus; and it may well be that it merely provides for what is a judicious enlargement of the undertaking; but it would authorize the acquisition by the company of any lands, in any part of *India*, on any tenure, at any price, and possibly (though as to this the wording is ambiguous) the cultivation of the lands otherwise than for the growth of tea. Every feature of localisation, limit, and certainty, which is prominent in the prospectus is wanting in the memorandum.

Then arises the more difficult question in the case, which requires a more particular attention to the facts and dates:—Is Mr. *Lawrence* entitled, on the ground of this variance between the prospectus and the memorandum of association, to have the register of the company rectified by the omission of his name as a member and owner of 2000 shares?

On the 4th of September, 1865, Mr. *Lawrence* signed and sent in, through the brokers named in the prospectus, an application, in the form attached to the prospectus, for 2000 shares, paying at the same time the deposit of 10*s.* per share. The company was incorporated and the memorandum of association registered on the 11th of September, 1865. On the 7th of October, 1865, Mr. *Lawrence* received from the company a letter of allotment of 2000 shares, and on the 14th of the same month paid to the bankers of the company the further sum of 10*s.* per share due upon allotment, giving up his letter of allotment in exchange for the bankers' receipt, which receipt acknowledged his title to, and promised delivery of, certificates for the 2000 shares.

From this time until the 14th of May, 1866, nothing passed between Mr. *Lawrence* and the company; and Mr. *Lawrence* states that before the 14th of May, 1866, he had never seen, and did not know the contents of, the memorandum or the articles of association.

I will consider presently how, in my opinion, the right of Mr. *Lawrence* to repudiate his shares would have stood on the 14th of May, 1866, but it will be convenient to take, in the first place, the narrative subsequent to that date. [His Lordship then entered at length into the subsequent facts of the case, a concise summary of which is given above, and observed upon the meeting of the 12th of July, 1866, as follows:—] At this meeting a committee of investigation into the affairs of the company was appointed. Mr. *Lawrence* must, I think, upon his own evidence, and that of his son, be taken to have been aware, through his son, of this meeting, and of what was said and done at it, and that his son was attending there in his father's interest. A committee of investigation appointed on behalf of shareholders is, as regards any one who promotes or concurs in it, the opposite of repudiation of the rights of a shareholder. [His Lordship then read the letter of the 27th of September, 1866, by which notice was given of Mr. *Lawrence's* intention to dispute his liability.]

It thus appears that on the 16th of May Mr. *Lawrence* and his legal adviser had in their hands the whole of the documents the variance between which is the ground of the motion to remove the name of Mr. *Lawrence* from the register. If he had at that time

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a right to repudiate his shares, it was a right which, in my opinion, might be waived; and if asserted, could not be asserted with effect unless asserted promptly and distinctly. No attempt at repudiation took place for upwards of four months, and during this time Mr. *Lawrence* must be taken, in my opinion, to have known, not merely that his name was on the register, and that he was so held out to the world as a shareholder in and member of the company, but also that his son was holding communication with, and endeavouring to influence the conduct of, the directors, on the footing of Mr. *Lawrence* being a shareholder. The Vice-Chancellor thought, and I entirely concur in his opinion, that any right of repudiation which Mr. *Lawrence* possessed on the 16th of May was, under the circumstances, asserted too late on the 27th of September.

This would be sufficient to dispose of the case, but I am unwilling to leave it to be supposed that I think Mr. *Lawrence* was free on the 16th of May, 1866, to reject or accept these shares.

In considering this part of the case, it is necessary to bear in mind the general scheme of the Act of 1862. No company can, under that Act, obtain a limit of liability for its shareholders, except by registering a memorandum of association, which is the charter and limit of the powers of the company, just as the articles of association may be said to be its rules of internal government. A copy of these documents is to be forwarded to every member on his request, at a fee not exceeding 1*s*. When registered they bind the company, and every member of it, as if each member had executed a deed with covenants to the effect of the provisions which they contain. On the other hand, the test, and the only test, which other members and the outer world can have of the membership of any particular person, is the entry of the name of that person on the register as a member.

The prospectus of the *Cachar Company* did not state very clearly whether it was or was not registered and incorporated when the prospectus was issued; but it appears that at that time, and also when Mr. *Lawrence* applied for shares, it was not yet formed, and in fact the memorandum and articles of association were registered, and the company was incorporated, on the 11th of September, 1865. It is, perhaps, to be regretted that the Legislature has not

prohibited the issuing of a prospectus, or the application for shares, prior to the registration of the memorandum of association and the incorporation of the company; but it must, in my opinion, be assumed against any one applying for shares in a company of this kind, not fully formed, that he is aware that no company desiring limited liability can rest on its prospectus, or on any private partnership contract or arrangement, but that there must be a memorandum expressing the object of the company, and a register shewing to the public who are its members. In this register of members Mr. *Lawrence*, by the form of his application for shares, expressly authorized his name to be entered, and he must have been aware that upon this being done, he would be held out to the world as a member of the company, whatever the form or substance of its memorandum or articles. He must be taken, in my opinion, to have known, either that the memorandum of association was prepared and accessible at the time of his application, or that it must be prepared forthwith; and that, in either case, both it and the articles must, in their very nature, be documents differing widely in form from, and, in all measures of detail at least, going beyond, the prospectus: and with regard to documents of this description, on the mode of framing which consistently with the prospectus so much difference of opinion might well arise, it would, in my opinion, be contrary to the first principles of justice to hold that Mr. *Lawrence* was at liberty to remain wholly passive, content to trust to what was stated in the prospectus, and, while he knew that an authority to register his name and hold him out as a shareholder had been given and probably acted on, keeping himself in a position to ratify all that had been done if the company turned out prosperous, but for the first time to inquire, and, if possible, repudiate, should a financial panic come, or the speculation turn out unsuccessful. Admitting that there existed no memorandum of association which Mr. *Lawrence* could have seen when he applied for shares, he was, in my opinion, entitled to a reasonable time after the registration of the memorandum to acquaint himself with, and, if so disposed, to object to its contents. What would be a reasonable time might, in some degree, vary in different cases, but would always be measured with reference to the thing to be done; and in this case I am unable to see why, at the

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time Mr. *Lawrence* received his letter of allotment of the 7th of October, 1865, and made his second payment upon it, he should not be held either to have had knowledge of the charter and rules under which the company was about to undertake business, or to have been content to waive any examination into them.

I think the motion before us must be dismissed with costs.

KINCAID'S CASE.

LORD CAIRNS, L.J. :—

This was an appeal from an order of Vice-Chancellor *Wood* taking the name of Mr. *Kincaid* off the register in respect of forty shares. The ground of such removal was the variance between the prospectus, on the faith of which Mr. *Kincaid* applied for the shares, and the memorandum of association.

In *Stewart's Case* (1) it was held by this Court that there was, in the case of this company, such a variance between these two documents as would justify a shareholder in repudiating the shares applied for on the faith of the prospectus, provided he did so in proper time. The only point, therefore, argued before us was the question of time. [His Lordship then referred to the dates of the application for and allotment of shares, and of the several payments made by Mr. *Kincaid*, and also to his affidavit denying knowledge of the memorandum of association at the time of those payments, and continued :—]

This denial would, in strictness, only cover the time previous to the 25th of April, 1866, when the last payment was made, and no application to take his name off the register was made till the 18th of July, 1866. In my opinion, reckoning even from the 25th of April, this would be too long.

But the same principle must govern this case as *Lawrence's Case*, and, without repeating the grounds for the opinion expressed in that case, I think that Mr. *Kincaid* was bound within a reasonable time after the allotment of the shares to inform himself of the nature of the documents of title under which he and the com-

(1) Law Rep. 1 Ch. 574.

pany were proceeding to carry on trade; and that much more than a reasonable time elapsed before the 25th of April, 1866.

The order of the Vice-Chancellor must, therefore, be reversed, but the company will be allowed no costs, as they did not argue the case before the Vice-Chancellor.

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SIR G. J. TURNER, L.J.:—

I fully agree in the conclusion at which my learned brother has arrived in both these cases. I desire, however, to be understood as giving no opinion how the matter would have stood if there had been no delay after actual knowledge of the facts.

Solicitors for Mr. *Lawrence*: Messrs. *Ashurst, Morris, & Co.*

Solicitors for the *Cachar Company*: Messrs. *Tathams, Curling, & Walls.*

Solicitors for the *Vyksounsky Company*: Messrs. *Rickards & Walker.*

Solicitors for Mr. *Kincaid*: Messrs. *Edwards, Webb, & Co.*

In re LONDON, HAMBURGH, AND CONTINENTAL EXCHANGE BANK.

EVANS'S CASE.

L. JJ. 1867 *March* 12.

Contributory—Signing Memorandum—Allotment of Shares.

E. signed the memorandum of association of a company as the holder of ten shares, and acted for a short time as a director of the company. Other directors were then appointed, and *E.* never afterwards had anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment of some was not final, and they were not taken up:—

Held, that *E.*'s name ought to have been on the register, and that he was a contributory in respect of ten shares.

Order of the Master of the Rolls affirmed.

THIS was a motion by way of appeal to have the name of *Maurice Evans* taken off the list of contributories of the *London, Hamburgh, & Continental Exchange Bank, Limited.*

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The company was formed in the year 1863, and Mr. *Evans*, at the solicitation of the promoters, signed the memorandum of association for ten shares, in order, as he stated, to give effect to the articles. He attended several meetings of the company and acted as a director, until the 10th of June, 1863, when a meeting was held, at which other directors of the company were appointed, and he never had anything more to do with the company. The original capital of the company was to be fifty shares of £100 each, all of which were allotted to and taken up by other persons, none being allotted to him. The number of shares was afterwards increased to 10,000, of which 6000 were first allotted and were all taken up; the other 4000 were afterwards allotted, but this allotment was not regularly confirmed by the directors, as was required by the articles, nor did it appear that any of these 4000 shares were taken up. None of the shares were allotted to Mr. *Evans*, and his name was never on the register of shareholders. The company carried on business for about a year and a half and paid a dividend, but then got into difficulties, and an order was made for winding it up.

Mr. *Evans's* name having been placed on the list of contributories, he moved, before the Master of the Rolls, to have it taken off, but the motion was refused by His Lordship (1).

Mr. *Evans* now moved to discharge the order of the Master of the Rolls.

(1) Lord *Romilly*, M.R., in delivering judgment, said that the object of the Act of 1862 was, by the 23rd clause, to compel persons who lent their names in order to establish a company, to be really substantially liable, and not to allow them to hold out their names as the promoters, and at the same time to incur no obligation.

The Act said that those who subscribed the memorandum should be entered on the register as shareholders. It was an obligation on them to be so entered, and it was compulsory on them, and they disobeyed the Act of Parliament if they were not entered; and it was the duty of the shareholders and of all those who signed the memorandum of association to have their names entered as shareholders of the company as soon as the register was made, and no person could get rid of that liability by disobeying the Act of Parliament and not sending in his name. If Mr. *Evans* had sent in his name, and had afterwards sold his shares, he might perhaps have got rid of his liability; but that very clause was introduced for the purpose of preventing persons from holding out their names to the public, and deceiving the public, as if they were forming a company, and then afterwards choosing to say that they had nothing to do with it. The name of Mr. *Evans* must be added as a contributory.

Mr. *Southgate*, Q.C., and Mr. *Locock Webb*, in support of the motion:—

Mr. *Evans's* name was never on the register, and no shares were ever allotted to him. The shares he had agreed to take were allotted to some one else, and he had nothing more to do with the company. Perhaps the strict mode of proceeding would have been to allot the shares to him, and then let him transfer them to some one else, but this was a mere form. The shares were at one time at a premium, and if Mr. *Evans* had thought himself entitled to any shares, he would naturally have applied for them. His name was never on the register, and all the shares were allotted to other people. Suppose that they had been all taken up, then he could not have had any shares, and what difference could the fact of the shares being taken up make, as between him and the company?

Mr. *Selwyn*, Q.C., and Mr. *Graham Hastings*, for the official liquidator, were not called upon.

SIR G. J. TURNER, L.J.:—

I feel very little doubt in this case. Mr. *Evans* originally subscribed the memorandum of association, and became one of the first directors, and, therefore, his first duty was to take care that his name was entered upon the register, because the 23rd section of the Act says that "The subscribers of the memorandum of association of any company, under this Act, shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and, upon the registration of the company, shall be entered as members on the register of shareholders." It was, therefore, the plain duty of Mr. *Evans* to enter his own name on the register. This, however, he did not do, but went on leaving the matter exactly as it stood. Then, can he take advantage of his own neglect? for if he had entered his name on the register he could only have got rid of his liability by a regular transfer, and it is impossible to say that he transferred the shares. If, indeed, all the shares had been allotted to others, a question might have arisen; but 4000 shares only were allotted subject to confirmation, and this never took place; therefore there are still 4000 shares not allotted, and, for the shares in respect

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of which he must be considered allottee, he must be placed upon the list.

LORD CAIRNS, L.J. :—

I regret, so far as it is proper to express regret, that we must come to this conclusion, because, no doubt, Mr. *Evans* has acted *bonâ fide*, and considered that after the 10th of June, 1863, he had nothing more to do with the company, and he never availed himself of his rights, or received a dividend. At the same time the provisions of the Act are intended to meet this case, and must be strictly pursued. It is plain that the original subscribers are, by the Act of Parliament, deemed to have taken the shares set opposite their names, which could not then be parted with except in a proper manner, and by proper authority. It was the duty of Mr. *Evans*, and his co-directors, at once to have entered upon the register of shareholders the names of the directors, as owners of shares, and then they could be relieved from liability only by a transfer, and the substitution of other names, in the way pointed out by the Act; but nothing of this kind was done. It is said that the shares which Mr. *Evans* would have had, were allotted to other people, but it seems that the allotment was not final, and that there were left at all times shares sufficient to answer the right of Mr. *Evans*. I think that his right was never taken away from him, and that his liability was never got rid of. Though, in form, the register need not now be rectified, the list of contributories will be made out as if it were rectified: that is, with ten shares against the name of Mr. *Evans*. This motion must, therefore, be dismissed, with costs.

Solicitor for the Appellant: Mr. *Riches*.

Solicitors for the Official Manager: Messrs. *Deane & Chubb*.

In re LONDON, HAMBURGH, AND CONTINENTAL EXCHANGE BANK.

WARD AND HENRY'S CASE.

L. JJ.
1867
Feb. 21, 25;
Mar. 21.

Companies Act, 1862, *s.* 35—*Rectification of Register—Vendor and Purchaser—Specific Performance—Contributory.*

W., a registered holder of shares, sold them to *S.*, and executed a transfer to him, which *S.* did not register. *S.* afterwards agreed to make over these shares to *H.*, and then refused to execute a transfer. *H.* thereupon persuaded *W.* to execute a fresh transfer direct to him, which *H.* took in for registration; but the directors, in consequence of a notice from *S.*, refused to register it. *H.* then filed a bill for specific performance against *S.* *S.* put in an answer stating the transfer from *W.* to *H.*, and his own willingness to concur in vesting the shares in *H.* in any way not involving his becoming a shareholder himself. Four days after this a petition for winding up was presented, upon which an order was made, *W.* being still the registered holder. The Master of the Rolls decided that the register ought to be rectified, and *H.* placed on the list of contributories instead of *W.*:—

Held, by *Turner*, L.J., that the jurisdiction given by the 35th section to rectify the register is general, and not confined to cases where there has been error, mistake, or default on the part of the company, but that the Court has a discretion whether it will exercise the jurisdiction, and that, in circumstances such as those of the present case, it ought not to be exercised:

Held, by Lord *Cairns*, L.J., that the jurisdiction given by the 35th section is confined to cases where the register is incorrect through default on the part of the company, and that as in the present case there had been no such default, the Court had no authority to rectify the register.

THIS was an appeal motion by Mr. *Henry* to remove his name from the list of contributories, of the *London, Hamburgh, and Continental Exchange Bank, Limited*, on which it had been settled by the Master of the Rolls, for thirty shares (1).

Ward was an original shareholder, and on the register as such. The shares of the company were transferable by an instrument of transfer, executed by transferor and transferee; and by article 20 of the articles of association the company might decline to register the transfer unless the transferee was approved of by the board of directors; and by article 24 the board might require to be satisfied as to the title of the transferor to transfer.

(1) Law Rep. 2 Eq. 226, 12 Jur. N.S. 493

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On the 15th of June, 1863, *Ward* sold these thirty shares to *Stafford*, through *Henry*, a broker; and on the following day executed a transfer to *Stafford*, and delivered it to him. It did not appear whether *Stafford* ever executed it, and it was never carried in to be registered.

There were accounts between *Stafford* and *Henry*, and on the 15th of April, 1864, a settlement was come to between them, upon which it was agreed that these shares should be taken by *Henry* in part satisfaction of what was due to him. On the 23rd of May, 1864, *Henry* tendered to *Stafford* for execution a deed of transfer of the shares from *Stafford* to *Powell*, a clerk and nominee of *Henry's*, which *Stafford* declined to execute.

On the 5th of September, 1864, *Henry* prevailed upon *Ward* to execute a transfer of the shares to *Powell*. This transfer was sent in for registration, but the registration was prevented by a letter from *Stafford*, which was not forthcoming, but was referred to in the following minute of the board of the 19th of September, 1864:—

"Letter read from Mr. *Stafford* relating to shares (thirty) standing in name of Mr. *W. Ward*, when it was resolved that the transfer produced of thirty shares, Nos. 3401—3430, from *Ward* to *Powell*, is to be allowed only on an indemnity being given to the bank jointly by Mr. *Ward* and Mr. *Henry*, in consequence of the notice contained in the letter of Mr. *Stafford*."

Ward, it appeared, would not join in giving an indemnity, and the following minute appeared under date of the 26th of September, 1864:—

"In reply to a communication read to the board from Mr. *Henry*, in respect to thirty shares from *Ward*, the secretary was instructed to reply, stating that the board could not authorize such transfer unless the original transfer of the same shares to Mr. *Stafford* be given up as advised by the solicitor."

The transfer from *Ward* to *Powell* was then returned to *Henry*, and nothing more took place between any of the parties and the company before the winding-up.

On the 10th of December, 1864, *Henry* filed a bill against

Stafford, praying for specific performance of the agreement for the transfer of the shares to *Henry*, and that *Stafford* might be ordered to cause these thirty shares to be registered in his own name, and thereafter to execute, or cause to be executed, to *Henry* or his nominee, a transfer of them. *Stafford* put in his answer on the 21st of March, 1865, and thereby stated that *Ward* had already executed a transfer of the shares direct to *Henry's* nominee; and that he, *Stafford*, would concur in vesting the shares in *Henry* or his nominee, in any way which might be necessary, except by becoming himself a transferee of the shares.

Neither *Ward* nor the company was a party to this suit, nor was any information of the nature of *Stafford's* answer given to the company before the winding-up.

The petition for winding up was presented on the 25th of March, 1865, four days after *Stafford's* answer had been put in, and a winding-up order was made upon this petition in the following month.

The Master of the Rolls decided that it was a case for rectifying the register under the 35th section of the *Companies Act*, 1862, and made an order fixing *Henry's* name on the list of contributories. From this order *Henry* appealed.

Mr. *Jessel*, Q.C., and Mr. *Caldecott*, for the appeal motion:—

The case must be looked upon thus: *Ward* was a partner in a partnership, from which he could not retire without the consent of the other partners, which had been refused. He must therefore remain. The case is wholly different from one arising in a company where the right of transfer is unlimited, and where the directors have no power to withhold their sanction. The case is not within the 35th section at all, for that section only applies where the register is wrong through some default on the part of the company: *Shepherd's Case* (1). The broad doctrine laid down by the Master of the Rolls in this case, that the equitable owner of shares is in all cases the person to be put on the register, cannot, we submit, be maintained. We say, therefore, that *Ward* must remain on the list. Rectification of the register means correcting mistakes in the register. There is no mistake in keeping *Ward's* name there, no

(1) Law Rep. 2 Ch. 16, 12 Jur. N.S. 897.

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transfer from him which the company could with propriety register ever having been sent in to them. The Legislature never meant specific performance cases to be tried under this section. The Master of the Rolls has refused to follow his own decision in the present case, and in *White's Case* (1) he explains it in a way which in fact contradicts it. If the register can be rectified on *Ward's* application now, it could have been so rectified more than two years ago, and *Ward* has lost his right by delay. Then we say that to put *Henry* on the list, nothing short of an actual transfer to him will do: *Ex parte Bugg* (2); but even if a contract would do, there is no contract of which *Ward* can claim the benefit as against him, for *Ward* contracted with no one but *Stafford*. *Powell* cannot be put on the list, for the transfer to him was void, because there had been a previous transfer to *Stafford*, of which the company had notice. Even admitting the doctrine of the Master of the Rolls that the equitable owner must be on the register, it depends on the result of the specific performance suit who is the equitable owner; and supposing *Henry* to abandon that suit now, *Stafford* could not get specific performance against him after such long delay and repudiation of the contract.

Mr. *E. R. Turner*, for *Ward*:—

Emmerson's Case (3) and *Stewart's Case* (4) shew that there is jurisdiction under the 35th section to rectify the register, when the wrong person is on it, though the company is in no default. *Ward* is not the proper person to be on it; either *Stafford* or *Henry* ought to be there. Where the company has substantially approved of a transfer the omission of formalities is unimportant: *Mayhew's Case* (5); *Nicol's Case* (6). The directors had approved of *Powell*. *Stafford's* notice was substantially withdrawn by the answer of the 21st of March, and from that time the consent of the directors to the transfer must be deemed unqualified. It is the purchaser's duty to see that the transfer is registered: *Sayles* v. *Blane* (7); *Walker* v. *Bartlett* (8); so *Ward* is in no default. *White's*

(1) Law Rep. 3 Eq. 86.
(2) 2 Dr. & Sm. 452.
(3) Law Rep. 1 Ch. 433.
(4) Ibid. 574.
(5) 5 D. M. & G. 837.
(6) 3 De G. & J. 387.
(7) 14 Q. B. 205.
(8) 18 C. B. 845, 861.

Case (1) is quite consistent with the present. There was in *White's Case* nothing but an agreement, and the parties had slept on their rights.

Mr. *Swanston*, for *Stafford* :—

Stafford is neither legal owner nor beneficial owner, so there is no ground for putting him on the list. Either *Ward* must remain there, or *Henry*, as beneficial owner, be substituted for him.

Mr. *Jessel*, in reply.

March 21. SIR G. J. TURNER, L.J., after stating the facts, continued :—

This case of course depends mainly, if not wholly, upon the extent of the jurisdiction given to the Court by the 35th section of the *Companies Act*, and the circumstances under which that jurisdiction ought to be exercised. [His Lordship read the section.] Now this much at least seems to me to be clear upon the section, that it rests in the discretion of the Court whether it will or will not exercise the jurisdiction thus given. There is not a word in the section rendering it imperative on the Court to exercise the jurisdiction. It must therefore, as it seems to me, depend upon the circumstances of each case whether the jurisdiction should be exercised or not; and my opinion is that, under the circumstances of this case, we ought not to exercise it. There is a question here whether *Ward* has not by his conduct released *Stafford* and adopted *Henry* as the purchaser of these shares; whether, in truth, *Stafford* or *Henry* is the equitable owner of these shares. There may, indeed, be a further question, whether enough may not have been done to release *Stafford* without enough having been done to adopt *Henry;* and beyond this, there is a suit actually pending between *Stafford* and *Henry* to determine to which of them these shares belong. What are the rights of these parties, and the equities between them, must, as it seems to me, depend upon facts and upon conduct which cannot be satisfactorily investigated under this summary jurisdiction. Upon this ground, therefore, I

(1) Law Rep. 3 Eq. 86.

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think that the order of the Master of the Rolls cannot be maintained, and that this summons ought to have been dismissed.

As, however, the question of the extent of jurisdiction given by this section was raised in the argument before us, I think it right to give my opinion upon it, although I much regret to say that my learned brother and I do not agree upon the point. It is not to be wondered at that different opinions should be formed upon the construction of a section worded as this section is. The question is, whether the jurisdiction given by it is general, applicable to all cases, or limited to cases in which there has been error, mistake, or default on the part of the company. Upon the best consideration I have been able to give to the subject, I am inclined to think that the jurisdiction is general, and not limited as suggested. The intention of the section, as I understand it, is to provide a summary means of dealing with cases which the Court in its discretion should think might be so dealt with. A large and wide discretion ought, I think, to be exercised by the Court in determining whether it will exercise the power given to it by the section, and it is, I think, too narrow a construction to hold that the section applies only where there is error, mistake, or default, on the part of the company.

The first part of the section seems to me to be general and unlimited: "If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company under this Act;" and it is only in the second branch of the sentence, "or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company," that default on the part of the company is introduced. It is, I think, reasonable to suppose that had default or mistake on the part of the company been intended to apply to and govern both branches of the sentence, it would have been so expressed in terms. The latter part of the section seems to me to confirm this view. It is there provided that in any proceeding under this section, meaning as I understand in any proceeding to rectify the register, the Court may "decide on any question relating to the title of any person who is a party to such proceeding, to have his name entered in or omitted from the register, whether such question arises between two or more members or alleged

members, or between any members or alleged members and the company, and generally the Court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register." Here, therefore, there is a distinct reference to questions arising between members or alleged members, shewing, as I think, that such questions were intended to be embraced by the section, and the case does not rest there, for a general power is given to decide any questions necessary or expedient to be decided, thus indicating, as I think, that the power intended to be given to the Court was most general and extensive. It is true power is only given for the rectification of the register, but the early part of the section seems to me to shew that what is meant by the rectification of the register is the taking off or putting on any name which may have been improperly entered on, or omitted from, or retained upon the register. The case is, I think, more strong when we look at the 98th section. In that section power is given to the Court, in settling the list of contributories, to rectify the register. This section must, as it seems to me, refer to the 35th, and then if the 35th applies only where there is error, mistake, or default, on the part of the company, there would not, so far as I can see, be any power, except in case of such mistake or default, to put any person on the list of contributories except those upon the register, whatever the justice and equity of the case might be, not at least until the justice and equity of the case had been determined by suit or action. I am far from saying that all cases in which there is a question of specific performance could properly be dealt with under this section. On the contrary, I think that but few of such cases could properly be so dealt with, and I think this case cannot be so dealt with. But there may be some which might be so dealt with, and I am not disposed to put so narrow a construction on the Act as would prevent it from operating upon them. Independently, however, of this question, I think, for the reasons I have given, that the order under appeal cannot be supported.

LORD CAIRNS, L.J.:—

The commencement of the winding up of this company was the 25th of March, 1865. At that time the name of Mr. *Ward* stood

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on the register as the owner of thirty shares. The question is, whether the register should be rectified under sect. 35 of the *Companies Act*, 1862, by substituting the name of *Henry* or of *Stafford* for the name of *Ward*.

The shares of the company were transferable in the usual way, by an instrument of transfer executed by the transferor and transferee; and by article 20 of the articles of association, the company might decline to register a transfer unless the transferee was approved of by the board, and by article 24 the board might require to be satisfied as to the title of the transferor to transfer.

On the 15th of June, 1863, *Ward* sold these thirty shares to *Stafford*, through *Henry*, a broker, and on the following day executed a transfer to *Stafford*, in the usual form. There is no doubt that this transaction constituted *Stafford* in equity the owner of the shares; that it was the duty of *Stafford*, as between himself and *Ward*, to have taken in the transfer to the company, and to have had his name substituted for that of *Ward* on the register; and that *Ward* could have compelled *Stafford* to perform this duty, and to indemnify him, *Ward*, against any loss occasioned by his remaining the registered owner of the shares. *Ward*, however, took no steps to compel *Stafford* to register, and *Stafford* never did register, the transfer.

Stafford, it appears, had some dealings with *Henry*, and on the 15th of April, 1864, a settlement of account was come to between them, on which it was agreed that *Stafford* should make over these thirty shares to one *Powell*, a clerk of *Henry*, who, it was agreed before us, was the nominee of *Henry*, and should for the purpose of this appeal, and of the summons and order leading to it, be taken to be the same as, and represented by, *Henry*. On the 23rd of May, 1864, *Henry* tendered to *Stafford* for execution a transfer of these thirty shares, which *Stafford* declined to execute.

With the dealings between *Stafford* and *Henry*, *Ward* had nothing whatever to do, and he might have kept himself free from any dispute between them, and stood upon his right to compel *Stafford* to take the shares out of his, *Ward's*, name. On the 5th of September, 1864, however, *Ward* was prevailed upon by *Henry* to execute a second transfer of the thirty shares to *Powell* (for *Henry*), passing over *Stafford*, and it is this second transfer which,

in my opinion, has given rise to the difficulty which subsequently occurred.

This second transfer was sent in by *Henry* to the board for registration in September, 1864. It would appear from the board minutes that *Stafford*, having heard of this second transfer, had written to the board, cautioning them against receiving it, on the ground that *Ward* had previously transferred the shares to him, *Stafford*; for a board minute was made on the 19th of September, 1864, to the effect that the transfer from *Ward* to *Powell* be allowed only on an indemnity to the bank by *Ward* and *Henry*, in consequence of *Stafford's* letter; and on the 26th of September, 1864, another minute was made, directing *Henry* to be informed that the second transfer could not be authorized unless the first transfer to *Stafford* was given up. And the second transfer appears to have been thereupon returned to *Henry*, for it comes out of his possession.

The board were, in my opinion, fully justified in acting as they did, and they would not, either as regards the company or *Stafford*, have been justified had they acted otherwise. The original transfer from *Ward* to *Stafford* they could not register, for it never was sent in for registration, and it does not even appear that it was ever executed by the transferee. The second transfer they could not register, for the title of *Ward* to make it was gone while the first transfer was outstanding, and *Stafford* asserting his title under it.

So far as the company and its executive are concerned, no further communication was made to them either by *Ward*, *Stafford*, or *Henry*, prior to the winding-up. On the 10th of December, 1864, however, *Henry* filed a bill against *Stafford*:—[His Lordship here stated the nature of the bill and answer, as given above.] To this litigation neither *Ward* nor the company was a party, nor was the board of directors informed, before the winding-up, of the character of *Stafford's* answer.

In this state of things the question appears to me to be, not what, before the date of the winding-up, were the equities between *Ward*, *Stafford*, and *Henry*, or what suit *Ward* or *Henry*, or both of them, could have maintained against *Stafford*, to have these shares taken out of the name of *Ward*, and put into the name of

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Stafford, or of *Henry*; but whether *Ward*, being found on the register at the winding-up, can say, within the meaning of sect. 35 of the Act, either, (*a*) that his name was, without sufficient cause, entered on the register; or, (*b*) that the name of *Stafford* or *Henry*, was, without sufficient cause, omitted from it; or, (*c*) that default was made, or unnecessary delay took place, in entering on the register the fact that *Ward* had ceased to be a member of the company.

Now the provisions of the Act of 1862, as to the register of members, may be thus described:—By sect. 25, the company is to keep a register of its members with their names and addresses, their shares, with the amount paid, the date when each name was entered, and that at which any one ceased to be a member. Under sect. 26 an annual return of these and other particulars is to be made to the Registrar of Joint Stock Companies. By sect. 32 the register kept by the company is to be open to public inspection on certain terms. By sect. 33, the register may be closed for thirty days in the year. Various penalties are imposed for any breach by the company of the enactments as to the register.

By sect. 23, the entry of the name on the register is a necessary ingredient in the title of a member; and, on the other hand, when a company is to be wound up, "membership," past or present, is, by sect. 38, made the test of liability, with the additions in consequence of death, bankruptcy, and marriage, contained in sects. 76—78.

I think it clear that the object of these enactments was to secure a list or register which, supposing it to be fairly and properly kept by the company, in accordance with the authorities and documents of title furnished to them, would shew at any time who were the shareholders, entitled to the profits, and liable to contribute to the debts, of the company. Whether the register would be thus fairly and properly kept, would depend upon whether the company and its officers faithfully performed the duty thrown upon them by the Legislature; but, inasmuch as the mere imposition of penalties would not, necessarily, secure the performance of this duty, and, inasmuch as the rights of persons entering or leaving the company ought not to be prejudiced by its non-performance, it was further necessary to provide for the correction of errors in the register occasioned by the default of the company.

This has been done by the 35th section, and this, in my opinion, is the scope and object of the 35th section; and by the 98th section, the power given by sect. 35 may be exercised, not only before a winding up of the company, but also for the purpose of settling a list of contributories upon a winding-up.

That this is the object of the 35th section is, in my opinion, clear from various considerations. In the first place, the section, from its silence as to the execution and production of proper transfers, and as to the proof of a title to transfer, would appear to assume that all these forms have been gone through in a manner which ought to have been satisfactory to the company, and that nothing remains but the proper expression upon the register of their effect. In the next place, the act to be done under the powers of that section is the "rectification" of the register, a term which of itself implies that the register, either in what is, or what is not upon it, is wrong: but the register cannot be wrong unless there has been a failure on the part of the company to comply with the directions in the Act as to the kind of register to be kept: for if the Act has been complied with, the register must be right and not wrong. Again, the section gives power to the Court, if it rectifies the register, to order costs and damages to be paid by the company, but not by any person other than the company against whom the motion may be directed. Further, the term "rectification" implies that the register is to be placed in the state in which, either as regards the entry or omission of a name, it ought to have been at the time when the entry or omission should have been made; a retrospective operation having a material effect on the interests and property of the company, and one which it is hardly possible to suppose could take place unless the company, by its own act, had rendered itself subject to it.

If, on the other hand, we consider the construction which it is suggested might be put upon this section, namely, that under it the Court is to try a suit between vendor and purchaser, and to ascertain who, in equity, is really the owner of the shares, we are met by difficulties which appear to me to be insuperable. In the first place it is obvious that the result of this may be to shew, that at any one period the persons really liable to make good the

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unpaid capital of the company are persons wholly different from those held out upon the register to the world as the members of the company. Further, we must observe that an order under this section may be applied for from a Court of law, as well as from a Court of equity, nor is there any power in a Court of law to refuse to entertain the application. Again, the powers conferred by the section are wholly insufficient to enable even a Court of equity to do justice in the most ordinary case of a dispute between vendor and purchaser. No costs or damages can be given against the party to the contract who is in the wrong. No injunction can be granted to restrain a dealing with or alienation of the shares. No order can be made for the execution of a transfer; for payment of the stamp, and other expenses of it; for production of it to the company. Moreover, the utmost that the Court could do by an order in the nature of a decree for specific performance, would be to direct a transfer and registration as from the time of the decree, with damages for delay against the party in the wrong; whereas, under this section, the Court, as I have already observed, does not act personally against vendor or purchaser, but acts, and acts retrospectively, and by way of correcting an error upon the register, and puts the register in the form in which, at some antecedent period, it ought to have been.

I ought not to omit to notice two provisions of the section which were relied upon by the Respondents in this appeal. One of them is the provision that the company may itself apply for rectification of the register. This provision might, I apprehend, be acted on by the company if it claimed adversely to omit or insert a name, and desired to have this claim adjudicated upon by the Court in presence of the party interested; or if it desired to establish, in the presence of the party interested, its right to omit from the register the name of a person which, *per dolum aut incuriam*, had been entered there. The other provision is that which enables the Court to decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or omitted from the register, when such question arises between two or more members, or alleged members. But these words are all controlled by the introductory words, "In any proceeding under this section." And the words would have an important operation

in many cases; for example, where two persons, claiming adversely, upon duplicate transfers from the same transferor, desired to have their rights determined.

The observations I have thus made will, if well founded, dispose of this case. Mr. *Henry*, or Mr. *Stafford*, or both of them, may have acted improperly as regards these shares, and against one or both Mr. *Ward* may or may not have some claim for indemnity; or he may be obliged to attribute his present position to the difficulty occasioned by his executing two transfers instead of obliging Mr. *Stafford* to take in and register the first transfer. But the company were not, in my opinion, in any default at the time of the winding-up, and there is therefore no case for the rectification of the register, or for omitting the name of Mr. *Ward* from the list of contributories.

I am obliged, with great respect to the Master of the Rolls, to dissent from the construction placed by him upon this section, in this case. I prefer the view of the section acted on by his Lordship in the cases of *Head* and *White* (1), the decisions in which appear to me to be hardly reconcilable with that in the case now under appeal.

I think that Mr. *Ward's* summons at the Rolls should be dismissed, and the appeal allowed; but having regard to the difficulties in the construction of this section, I think no costs should be given against Mr. *Ward*. The official liquidator will have his out of the estate.

Solicitors for Mr. *Henry:* Messrs. *Edmands & Mayhew.*
Solicitors for Mr. *Ward:* Messrs. *Head & Pattison.*
Solicitor for Mr. *Stafford:* Mr. *H. J. Riches.*
Solicitors for the Official Liquidator: Messrs. *Deane & Chubb.*

(1) Law Rep. 3 Eq. 84, 86.

L. JJ.
1867
March 14.

PRYSE *v.* CAMBRIAN RAILWAY COMPANY.

Vendor and Purchaser—Payment of Purchase-money into Court—Railway Company.

The Plaintiff agreed to sell lands to a railway company at a sum to be paid on completion, with interest at £4 per cent. from the date of the agreement. The company were to be at liberty to take possession on making a certain deposit. If from any cause, other than default of the vendor, the purchase was not completed in six months, the interest was, from the expiration of the six months, to be at the rate of £5 per cent. The deposit was made, and possession taken. The company when pressed to complete, more than three years after the date of the agreement, alleged inability from want of funds :—

Held (affirming the decision of *Stuart*, V.C.), that the Plaintiff was not entitled to an order on motion for payment of the balance of the purchase-money into Court.

THIS was a motion by way of appeal from an order of Vice-Chancellor *Stuart*, refusing a motion to compel the Defendant, the company, to pay purchase-money into Court.

By agreement, dated 30th of April, 1862, between the Plaintiff and a railway company, to the rights and liabilities of which the *Cambrian Railway Company* had since succeeded, the Plaintiff agreed to sell, and the company to buy, certain lands mentioned in a schedule. The price was to be fixed by arbitration, in manner provided by the *Lands Clauses Act*, and to be payable on completion, with interest at £4 per cent. per annum from the date of the agreement. It was agreed that the company should be at liberty to take possession upon depositing £1380 (£50 per acre) in the *Union Bank* in the names of two stakeholders, one on behalf of the Plaintiff, and the other of the company, to remain there until the purchase should be completed, or the purchase-money paid into Court, pursuant to the agreement. It was also agreed that if the purchase should not be completed within six calendar months from the date of the agreement, from any cause other than the default of the vendor, the interest on the purchase-money should be increased, as from the expiration of such six calendar months, to the rate of £5 per cent. per annum; and that upon completion the purchase-money was to be paid; and if, through any

default of the vendor, a conveyance should not be made to the company within six calendar months from the date of the agreement, the purchase-money, together with the amount of interest payable under the agreement, should be forthwith paid into Court, under the Act, and thereupon the deposit should be given up to the company, and no further interest be payable by the company.

The company made the deposit required by the agreement, and entered into possession of the land, and made the railway over it. The value of the land was ascertained by arbitration, the title was investigated, and the conveyance approved and engrossed. At length, on the 27th of November, 1866, the Plaintiff's solicitors wrote to the solicitors of the railway company complaining of their delay, and urging a completion of the purchase. The solicitors of the company replied: "We are in receipt of your letter of the 27th inst., a copy of which we have sent to the secretary of the company, as our only reason for not sending you the engrossment has been that, in the absence of the necessary funds, we are not prepared to settle this purchase. Please, at your convenience, let us know what amount will be required to complete the purchase, including costs. An approximate estimate is all we want, for it is of little use demanding completion of the company, and we ourselves are alike in ignorance how much money is required to complete. We believe some money is deposited at the *Union Bank*, but at this moment we do not know how much."

In January, 1867, the Plaintiff filed his bill praying for specific performance, and that in default of the company paying the purchase-money the Plaintiff might be declared entitled, at his option, either to enforce the agreement or to rescind it, and that, in the latter case, the deposit of £1380 might be declared to be forfeited to the Plaintiff, and that the company might be ordered to deliver up possession of the lands to him, and might be restrained by injunction from remaining in possession thereof, or using the same for the purposes of their railway.

The Plaintiff, on the 14th of February, 1867, moved, before Vice-Chancellor *Stuart*, for an order upon the company to pay the balance of their purchase-money into Court. His Honour refused the motion, but made the costs costs in the cause.

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Mr. *Bacon*, Q.C., and Mr. *Archibald Smith*, for the appeal motion, referred to *Gibson* v. *Clarke* (1); *Burroughs* v. *Oakley* (2); *Fox* v. *Birch* (3); *Pell* v. *Northampton and Banbury Junction Railway Company* (4).

Mr. *Greene*, Q.C., and Mr. *Fry*, for the company, were not called upon.

SIR G. J. TURNER, L.J.:—

I think that the order of the Vice-Chancellor was right. Possession was taken under an agreement expressly authorizing the company to take it on depositing a certain sum of money, which deposit was duly made. The company are using the lands for the purpose for which they were sold. As for the delay, the parties have expressly provided for it, the contract containing an express stipulation that in the event of delay, not occasioned by the default of the vendor, an increased rate of interest is to be payable.

LORD CAIRNS, L.J.:—

The vendor might, if he had chosen, have rested on his rights under the *Lands Clauses Consolidation Act*. Had he done so, the company would have been entitled to take possession (sect. 85) upon depositing a sum determined by two surveyors to be the value of the lands, and we well know how small a sum surveyors are in the habit of fixing for this purpose. The vendor wisely determined to agree that they might take possession on the terms provided by the agreement, and cannot, by reason of their having taken possession, claim any right beyond what is given by the agreement. He must go on to decree.

The appeal motion was accordingly refused, with costs.

Solicitors for the Plaintiff: Messrs. *Boys & Tweedies*.
Solicitors for the Company: Messrs. *N., C., & C. Milne*.

(1) 1 V. & B. 500.
(2) 1 Mer. 52.
(3) 1 Mer. 105.
(4) Law Rep. 2 Ch. 100.

HOPKINSON *v.* LORD BURGHLEY.

L. JJ.
1867
March 15.

Production of Documents—Confidential Letters from a Stranger—Property in Letters.

A Defendant cannot refuse to produce private and confidential letters from a stranger on the ground that the writer forbids their production. But the Plaintiff will be put upon an undertaking not to use them for any collateral object.

Decision of the Master of the Rolls reversed.

THIS was an application for production of certain documents, admitted to be in the possession of the Defendants, but which they refused to produce.

The bill was filed by Mr. *C. Hopkinson*, a member of the *Conservative Club, St. James' Street*, against the trustees and committee of the club, complaining of certain acts done by them. A summons having been taken out by the Plaintiff for the production of documents, the Defendants refused to produce two letters, dated the 9th and 16th August, 1865, written by a stranger, who was not a member, to the secretary of the club. One of these letters was marked "private," and the other "private and confidential," and when the Defendants were called upon to produce them, the Defendants' solicitor applied to the writer for his permission to produce them to the solicitors for the Plaintiff. The writer refused his sanction to their production, alleging that there was nothing in them touching the matters in question in the suit that was not contained in a subsequent letter from him of the 7th November, 1865, which had been produced. The summons was heard before the Master of the Rolls, who refused to order the production of the letters. The application was therefore renewed before the Lords Justices.

Mr. *Osborne Morgan*, for the Plaintiff:—

The Master of the Rolls refused to order the production of the letters on the ground that they were the joint property of the receiver and the sender, the latter not being a party to the suit;

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relying upon the authority of *Pope* v. *Curl* (1). But the property of the sender is only of a qualified nature, and is confined to a right to restrain them from being published or used for any other improper purpose. He has no right to prevent their production for the purposes of justice: *Gee* v. *Pritchard* (2); *Williams* v. *Prince of Wales Life Assurance Company* (3). The fact of their being marked "private and confidential" makes no difference. There is no privilege in any communications between a Defendant and a stranger: *Goodall* v. *Little* (4).

Mr. *Walford*, for the Defendant:—

It would be a breach of confidence in the Defendants to produce the letters, unless compelled to do so by the Court. They are immaterial to the questions in the suit, for they contain nothing that is not said more fully in the subsequent letter which has been produced.

SIR G. J. TURNER, L.J.:—

I am of opinion that these letters must be produced. The writer of a letter trusts the receiver with the letter, and he must take the consequences of its being in his possession. The question which now arises is between a stranger and the receiver. If the sender of a letter wishes to restrain the receiver from shewing it to any other person, he must file a bill for that purpose. Unless that is done the property is in the receiver. There must, however, be an undertaking not to use the documents, or any copies of them, for any collateral object.

LORD CAIRNS, L.J.:—

I am of the same opinion. The question in all these cases is what was the purpose or object in the mind of the person sending the letter. The writer is supposed to intend that the receiver may use it for any lawful purpose, and it has been held that publication is not such a lawful purpose. But if there is a lawful purpose for which a letter can be used, it is the production of it in a Court of

(1) 2 Atk. 342.
(2) 2 Sw. 402.
(3) 23 Beav. 338; 1 Jur. N.S. 55.
(4) 1 Sim. (N. S.) 155.

justice for the furtherance of the ends of justice. In the present case the recipients were justified in declining to produce the letters without the direction of the Court, but they cannot now refuse to produce them. There must be an undertaking in the terms of the undertaking in *Richardson* v. *Hastings* (1). The costs will be costs in the cause.

Solicitors for the Plaintiff: Messrs. *Williams & James.*
Solicitors for the Defendant: Messrs. *F. H. & H. H. Walford.*

HAGELL *v.* CURRIE.

Practice—Payment into Court upon Motion.

Money will not be ordered to be brought into Court upon motion before decree, unless it appears clearly upon the answer to belong to the Plaintiff.

Where the admissions made by the answer shew the Defendant to be a trustee of money, a mere formal denial of the fact will not prevent him from being ordered upon motion to bring the money into Court.

Order of the Master of the Rolls reversed.

THE bill in this case was filed by *William Hagell,* on behalf of himself, and all other the shareholders in the *Breech-Loading Armoury Company, Limited,* except such as were named Defendants, against the six directors of the company, *C. H. Edmands* the solicitor to the company, and the company; and it stated that the company was formed to carry on the business of gun-making, and to carry into effect a certain agreement, by which one *M'Donald,* who had purchased the business as agent for the Defendant *Edmands,* agreed to sell to the proposed company the stock in trade of Messrs. *Calisher & Terry* for £26,500. That by the articles of association *Edmands* was appointed solicitor, and *J. Dales* architect and surveyor of the company. That shortly after the incorporation of the company it was agreed between *Edmands* and Messrs. *Calisher & Terry* that the purchase-money should be increased to £36,455, with the object, among other things, of enabling *Edmands* to obtain funds to pay to each of the Defendants, as directors, the

(1) 7 Beav. 354.

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sum of £250. The bill then stated several financial operations, and that *Edmands*, or *Dales*, had paid, or agreed to pay, to each of the directors £250 for their respective personal benefit. That these and other transactions alleged in the bill were illegal, and incapable of confirmation by any majority of shareholders of the company. And the bill prayed a declaration that the Defendants, other than the company, were bound to indemnify the company against all loss by reason of their transactions, and consequent relief.

Four of the directors, by their answer, gave explanations of the different transactions, and denied that the purchase-money was increased for the reason given in the bill, stating that previously to the formation of the company *Dales* had arranged and determined to pay to each of the intended directors of the company the sum of £250, and he had accordingly paid to each of the six directors the sum of £250, out of a sum of £4500 paid by the company to him as part of the purchase-money.

The Plaintiff, on the answer coming in, moved that each of the four Defendants who had answered might be ordered to pay into Court the sum of £250, and the Master of the Rolls, on the 28th of February, made an order accordingly (1).

The four Defendants now moved, by way of appeal, that this order might be rescinded.

Mr. *Jessel*, Q.C., and Mr. *Caldecott*, for the Appellants, contended that such a bill could not be maintained; and if it could, that the Defendants could not be ordered to pay this money into Court at this stage of the proceedings. There was nothing wrong in the

(1) Feb. 28. LORD ROMILLY, M.R.:—I think that the answer discloses facts which shew that the Defendants are trustees of the money, if all the facts stated there are correct, and that they are not entitled to take it for their own personal benefit. In fact they are trustees for the company—that is to say, in other words, for the members of the company. Therefore, considering the Plaintiff has an opportunity of amending his bill, and that this is a question properly to be disposed of upon the hearing, I am of opinion that I shall act correctly in protecting and securing the fund until the question is decided; and, therefore, I think that an order should be made directing the Defendants to pay the money into Court—that is to say, that each of these directors should pay the sum of £250 into Court on or before the first day of Easter Term.

transaction; the directors received this money for their trouble, and every one coming into the company adopted the agreement. In such a case, and where the Plaintiff only claims money as a debt, or on a dispute, the money will not be brought into Court upon motion before decree: *Peacham* v. *Daw* (1); *Richardson* v. *Bank of England* (2).

Mr. *Graham Hastings*, for the Plaintiff:—

It does not appear, on the face of the agreement, that the Defendants were to have this money; they ought not to have had it, and must be taken to be trustees of it for the company, and must bring it into Court: *Hichens* v. *Congreve* (3). The money is traced and ear-marked, and must be refunded: *Gaskell* v. *Chambers* (4). If a Defendant shews himself by his answer to be, in fact, a trustee, his mere formal denial of the legal inference will not protect him.

Sir G. J. Turner, L.J.:—

I think that the Master of the Rolls, in his anxiety to do what he considered justice in this case, has gone a little too far in ordering payment of these sums into Court.

In order to justify the order for payment of this money into Court upon motion, it must clearly appear that the money was the money of the company. The Defendants deny this; they say that it was part of the purchase-money paid to *Dales*, and agreed to be paid to them before the purchase by the company. It may well be that a case will be made against the answer, and, admitting the allegations in the answer, it may be that *Dales* will be shewn to have been the agent of the company, or there may be other circumstances which will give the company an equity against *Dales* to have the purchase treated as for less than £36,455. But that is not the case made by the bill, and certainly it is not admitted by the answer of the Defendants.

The principle of the decision of the Master of the Rolls is not that the case is now clear, but that the Court at the hearing

(1) 6 Madd. 98.
(2) 4 My. & Cr. 165.
(3) 1 Russ. & My. 150, n.
(4) 26 Beav. 360, 5 Jur. N.S. 52.

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of the cause may come to the conclusion that the money ought to be paid. I do not apprehend that, according to the practice of the Court, where a sum of money is only claimed by the Plaintiff it will be ordered to be brought into Court. It must appear clearly that the money actually belongs to the Plaintiff. That was the old rule of the Court in the time of Lord *Eldon*, when these applications were more common. It was always held that there must be a clear admission upon the answer, and I am not aware of any authority altering the practice.

LORD CAIRNS, L.J.:—

The jurisdiction of the Court to order money to be brought in upon answer is one which ought to be exercised with considerable care and caution. If money is ordered to be brought in when it is not clearly due, very gross injustice may be done, as the Defendant may be put to great inconvenience, and afterwards be told that his view of the case was correct. I do not mean to say that in a suit to establish a constructive trust, the rights of the Plaintiff may not appear so clear upon the answer as to justify the Court in ordering payment upon motion; there may be such cases where the facts are admitted, and a mere formal denial by the Defendant that he was a trustee would not be enough to prevent the order from being made. But here the equity is, that the purchase-money having been fixed at £26,500, it was increased to £36,455 in order to enable these payments of £250 to be made to the Defendants. If these facts were admitted the case would be different, but they are denied by the answer, and if the equity alleged by the bill be denied, I doubt if a motion to pay money into Court can be supported upon a different equity picked out of passages in the answer.

Now, the answer states things which may result in entitling the Plaintiff to relief, but at the same time they are consistent with the Defendants not being chargeable. There might be a case in which a person who afterwards became a director might be entitled to such money. That, however, is exactly the case to be decided in this suit, and it would be a miscarriage of the Court to anticipate the decision, and bring money into Court, so giving the Plaintiff in fact security for the result of the litigation.

The motion made before the Master of the Rolls ought to have been refused with costs; the Appellants will be entitled to have their costs of the motion before us as costs in the cause.

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Solicitors for the Plaintiffs: Messrs. *Vining & Sons.*
Solicitors for the Defendants: Messrs. *Edmands & Mayhew.*

Ex parte PEAKE.
In re BRODIE.

L. JJ. 1867 *March* 9, 15.

Insolvency—Creditor holding Security—Laches.

B. became insolvent in 1827. His mother held a security on a contingent interest of his expectant on her death, which interest would fail if he died in her lifetime. She did not prove in the insolvency, but retained her security, and the assignee sold the equity of redemption, which was purchased by a trustee for persons of whom the mother was one. In 1857 *B.* died in his mother's lifetime, so that the security failed. The mother died in 1864, and in 1866, further assets having unexpectedly come in, the personal representative of the mother claimed to prove, and the proof was admitted by the Commissioner:—

Held, that the proof had been rightly admitted.

THIS was an appeal from a decision of Mr. Commissioner *Goulburn*, by which he allowed a proof by the personal representative of *Anna Brodie*, the mother of *Alfred Brodie*, an insolvent debtor, against the insolvent's estate, of the unpaid balance of £2000, and interest from the year 1831 down to the time of the insolvency, which took place in 1837.

By an indenture, dated 24th of May, 1831, made between *Alfred Brodie*, of the one part, and *J. Walter*, *H. C. Knox*, and *W. Hood*, of the other part, reciting that under a certain deed-poll therein mentioned, and the will of *John Walter*, deceased, *Alfred Brodie* was beneficially entitled, upon the decease of *Anna Brodie*, to certain personal property, or shares, and had agreed to assign the same upon the trusts and for the purposes thereafter mentioned, *Alfred Brodie* assigned his shares under the deed-poll and will to *Walter*, *Knox*, and *Hood*, in trust to apply the same, as and when the same should be received, towards discharging all such sums of money,

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not exceeding in the whole, together with the sum of £270, due from *Alfred Brodie* to *Anna Brodie*, the sum of £2000, as *Walter*, *Knox*, and *Hood*, should pay on account of *Alfred Brodie*, with interest at £5 per cent. from the time of payment; and, after payment of the said £270, and other sums of money, to pay the surplus to *Alfred Brodie*, his executors, administrators, and assigns. The deed contained a power of attorney from *Alfred Brodie* to the trustees, and covenants for title.

The trustees of this deed paid £1730 to the creditors of *Alfred Brodie*, the sum being advanced by *Anna Brodie*, and making up, together with her debt, the sum of £2000.

The vested reversionary interest comprised in this assignment was very small, the interest of *Alfred Brodie* in a share in the *Times* newspaper, which share formed the principal part of the property comprised in the will and deed-poll, being contingent on his surviving his mother, who had a life estate in the share.

In January, 1837, *Alfred Brodie* took the benefit of the Act, 7 Geo. 4, for the relief of insolvent debtors; and by indenture, dated the 18th of January, 1837, conveyed and assigned all his property to the provisional assignee. He did not enter his mother, or the trustees of the deed of 1831, as creditors in his schedule, but stated therein as follows:—"By indenture, bearing date the 24th of May, 1831, made between myself, of the first part, and *J. Walter*, *H. C. Knox*, and *W. Hood*, of the other part, and in consideration of £2000 paid by them to my then creditors, I assigned all my interest under the will of the late *J. Walter*, of, &c., in trust for repayment thereof, a copy of which said deed is filed in this honourable Court. I do not consider my interest thereunder of any value beyond the said sum of £2000."

The creditors' assignees afterwards put up for sale, subject to the above security, the insolvent's reversionary interests comprised in it. They were purchased by a Mr. *Tomlins* for £75, and were assigned to him by an indenture dated the 3rd of July, 1839. This indenture recited at length the indenture of the 24th of May, 1831, and the agreement for the sale, "subject to the hereinbefore recited mortgage, upon which the sum of £2800 and upwards is now due for principal and interest," and by it the reversionary interests were assigned to *Tomlins*, "subject, nevertheless, to the hereinbefore recited mort-

gage, and to the payment of the said sum of £2800 and upwards, now due thereon, and the interest henceforth to grow due under the same."

By a deed of the 24th of July, 1839, *Tomlins* admitted that he had purchased as a trustee for the proprietors of the *Times*, of whom *Anna Brodie* was one, and that he had assigned the contingent interests, subject to the mortgage, to another person as trustee for them.

Anna Brodie was at that time about the age of sixty-five years, and *Alfred Brodie* about twenty-nine. Neither *Anna Brodie*, nor the trustees of the deed of 1831, made any claim under the insolvency, the security being at that time considered sufficient.

Alfred Brodie died in 1857; *Anna Brodie* died on the 6th of October, 1864. Her executors received £396 4*s.* 9*d.*, the amount of the vested reversions of *Alfred Brodie* comprised in the security, and this was all that could be recovered under that security, the contingent interest having failed by *Alfred Brodie's* death in his mother's lifetime.

In 1866 further property fell in, and a claim was made by *Anna Brodie's* personal representative to prove for the balance of the moneys due on the security of 1831. The learned Commissioner admitted a proof for this balance; and Mr. *Peake*, the creditors' assignee, now moved by way of appeal against this decision.

Mr. *Jessel*, Q.C., and Mr. *Martineau*, for the Appellant:—

We contend,—First, that the debt is not sufficiently proved: Secondly, that the alleged creditor, being secured, elected to keep her security, and did not prove. A creditor may retain his security and stand aloof from the insolvency, or give up his security and prove for his whole debt, or have it sold or valued and prove for the difference. The security in the present case was estimated as worth more than the debt; the equity of redemption sold for something, so that the creditor could not have proved except by giving up the security. She elected to stand by the security and give up her right of proof, and her personal representatives cannot be remitted to the right of proof, but are bound by her election: Thirdly, we say that if there was not an election, there has been an abandonment of

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the right of proof. Such a right cannot run on for ever; there must be a time after which a creditor who stands by his security, and does not come in to prove, must be taken to have abandoned his right to do so; and here the creditor stood by her security for twenty years, and lived for seven years after it had failed, without offering to prove: Fourthly, we say that a creditor cannot hang back for thirty years, taking the chance of a security being good, which, according to the most probable course of events, was ample, and then, after it has become worthless, come in as an unsecured creditor. If the security had been sold at the time of the insolvency, it would have produced more than the debt.

Mr. *Bacon*, Q.C., and Mr. *C. W. Wood*, for the claimant:—

There is a difference between bankruptcy and insolvency. In insolvency the creditors do not prove; the insolvent makes out a schedule of them. There is no certificate in insolvency, and no release from liabilities, so a creditor holding a security may fairly lie by and take his chance.

[The LORD JUSTICE TURNER:—How do you say that this case would stand in bankruptcy?]

We do not admit that this proof would have to be rejected in bankruptcy. In bankruptcy there is a present fund to be divided among the creditors. The rule is, that a creditor cannot retain his security and take a share of this fund besides, as if he had no security; but there is no reason why he may not hold his security for a time, and afterwards come in upon the same terms as at first, only not disturbing any past dividends.

[The LORD JUSTICE LORD CAIRNS:—It would seem to make some difference whether the security is productive or unproductive, for if it is productive, the debt goes on decreasing; but in the present case, the creditors are damnified.]

They have no reason to complain: if the security was valuable, and would have left a surplus, as they now say, why did they not redeem it? The lapse of time is unimportant, for there is a *quasi* trust for creditors; and we cannot be said to have been guilty of

laches in resting upon what was likely to prove a sufficient security.

Mr. *Jessel*, in reply:—

It was the regular course in insolvency for creditors to prove if the insolvent had omitted their debts from his schedule. It is an error to say that there was no discharge of the debtor under the *Insolvent Act*. He was discharged from all the demands of his creditors, subject to a right, at the discretion of the Court, to put in force for their benefit the recognizance into which he was obliged to enter. The accident of property falling in at a late period cannot alter the rights of the parties. It is clear, from sect. 35 of the Act and its general scope, that it was intended that the rights of the parties should be settled once for all. It is outrageous to say that there cannot be laches in bankruptcy, where other people have been induced to act on the belief that the creditor has given up his claim; and the case is strong here, the creditors having been greatly damnified. After a length of time slight circumstances have been held to amount to sufficient evidence of election. Here were circumstances by no means slight, the creditor having concurred in a dealing with the equity of redemption on the footing of an amount being due on the security, which included interest long after the insolvency—an amount therefore which could not have been proved.

March 15th. SIR G. J. TURNER, L.J., after stating the facts, and disposing of the objection that the evidence in support of the debt was insufficient, continued:—

The second objection urged by the assignee against the right of proof is, that *Anna Brodie* elected to stand upon her security and was bound by that election, so that she could not afterwards prove. It was contended that the case was governed by analogy to bankruptcy, where a creditor holding security cannot prove for his whole debt without giving up his security. I am of opinion that this objection cannot prevail. A creditor of a bankrupt may stand on his security and abstain from coming in under the bank-

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ruptcy, but if his security fails before the estate is distributed, I apprehend he may come in and prove. Under an insolvency the future estate is liable, and I think that, by parity of reasoning, a creditor with security may prove when the security fails. It was argued that the rights of the other creditors had been affected by the secured creditor's not having come in, for that if she had come in her debt would practically, under the circumstances of this case, have been expunged, inasmuch as the estimated value of the security at the time exceeded the debt. The answer to this is, that the rights of the other creditors are subject to the rights of the secured creditor in respect of the security, and the unsecured creditors are suffering no wrong, for if the security was worth more than the debt, the assignees ought to have redeemed it. An argument was founded on the purchase made in 1839 by a trustee for the proprietors of the *Times*, of whom *Anna Brodie* was one; but this does not seem to me to affect the case. It was lastly argued, that *Anna Brodie* must be taken to have abandoned her right to prove; but I do not see any foundation for this. She had a right to stand on her security till it failed, and her representatives came in as soon after its failure as there were any assets coming in to answer their claim. I am of opinion, therefore, that this appeal ought to be dismissed.

LORD CAIRNS, L.J.:—

I am of the same opinion, and for the same reasons.

Solicitors for the Assignees: Messrs. *Walker & Martineau.*
Solicitor for the Claimant: Mr. *A. Dobie.*

SEATON *v.* GRANT.

L. JJ.
1867
March 7, 9, 11.

Practice—Taking Bill off the File—Improper Suit—Want of Interest in Plaintiff.

The Plaintiff having lost money by speculating in the shares of a joint stock company, purchased five shares, for the purpose of qualifying himself as a shareholder, and then filed a bill, on behalf of himself and the other shareholders, against the company and other persons, impeaching certain transactions between them, on the ground of fraud. The bill also impeached certain preliminary proceedings which had been taken for the purpose of winding up and re-constituting the company. After the bill was filed, the company was wound up and re-constituted. The Defendants put in answers which were excepted to for insufficiency, and, while the exceptions were pending, they moved to take the bill off the file, or to stay proceedings:—

Held (affirming the order of *Malins*, V.C.), first, that at that stage of the cause, the Defendants not having sufficiently denied the charges of fraud, the *mala fides* of the Plaintiff in filing the bill was no ground for taking the bill off the file:

Secondly, that the small interest of the Plaintiff was no objection to the bill, as it was filed on behalf of himself and other shareholders:

Thirdly, that as the bill impeached the preliminary proceedings in the winding up, the fact of the company having been wound up subsequently was no ground for staying the proceedings.

THIS was an appeal from an order made on the 12th of February, 1867, by Vice-Chancellor *Malins*, refusing an application of the Defendants that the bill might be taken off the file, or that all further proceedings might be stayed.

The bill was filed by *Charles Seaton*, on behalf of himself and all other shareholders in the *Credit Foncier and Mobilier of England, Limited*, except the Defendant, *Albert Grant*, against *Albert Grant*, *George Edward Seymour*, and the above-named company, under the following circumstances:—

The Defendant, *Albert Grant*, was the managing director of the above-named company. The Defendant, *George Edward Seymour*, was the chairman of a company called the *City of Milan Improvements Company*. The Plaintiff alleged that the two last-named Defendants had, in the year 1865, formed what is called a "syndicate" on the *Stock Exchange*; that is, a combination for the purpose of raising the value of the shares of the *Milan Company* to a fictitious premium; and that, with this end, *Grant* had purchased

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12,129 shares in the *Milan Company*, and paid for them out of the funds of the *Credit Foncier*, by which the latter company had sustained a great loss, the shares of the *Milan Company* having fallen very much in value.

He also alleged that the Defendants were taking measures to re-constitute the *Credit Foncier*, by dissolving the company, and transferring its assets and liabilities to a new company.

The bill prayed that the Defendants, *Grant* and *Seymour*, might repay to the *Credit Foncier* the money expended in the purchase of the shares in the *Milan Company*, and that the *Credit Foncier* might be restrained from handing over their assets to any other company, until all their debts and liabilities had been paid and satisfied.

The bill was filed on the 19th of July, 1866, and immediately afterwards the Plaintiff moved for an injunction, in terms of the prayer, before Vice-Chancellor *Kindersley*, who refused the motion with costs.

On the occasion of the motion, the Plaintiff was cross-examined in Court, when it appeared that he held only five shares of £20 each in the *Credit Foncier*, which he acquired solely for the purpose of filing this bill; and that his reason for filing the bill was that he and several of his friends had lost money by speculating in shares of the *Credit Foncier*, and that he was advised that if he bought shares, and then filed a bill to impeach certain transactions of which he had notice, he would probably be bought off at a high price, and so obtain compensation.

Subsequently to the filing of the bill, two extraordinary meetings of the *Credit Foncier* were held on the 30th of July and the 15th of August, 1866, at which resolutions were passed for winding up the company voluntarily, and for the formation of a new company, for objects which would include the carrying on of the business of the *Credit Foncier*.

The Defendants put in answers to the bill, but refused to give full information to the Plaintiff as to the transactions complained of; and their answers were excepted to by the Plaintiff.

The motion now under appeal was made by the Defendants *Grant* and the *Credit Foncier*, and, having been refused by the Vice-Chancellor, was now renewed before the Lords Justices.

(1) See 36 L J Ch 838 840

The *Attorney-General* (Sir *John Rolt*), Mr. *Karslake*, Q.C., and Mr. *Waller*, for the company; and

Sir *Roundell Palmer*, Q.C., Mr. *Baily*, Q.C., and Mr. *Speed*, for the Defendant *Grant*:—

We say, first, that this suit is not *bonâ fide*. The Plaintiff had no shares in the company while the bill was being prepared; he bought five shares just before it was filed, and can give no reason for his proceedings, but that he had lost money by speculating in the shares of the company, and wanted to make the company repay him these losses. The Court will not entertain such a bill: *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1). That case decided that the Plaintiff must have a legitimate interest in the subject matter of the suit. The interest of the Plaintiff is merely nominal. If his whole claim is recovered, and divided among the shareholders, his share would be about 40*s*. Such a bill is an abuse of the process of the Court, and partakes of the nature of maintenance: *Filder* v. *London, Brighton, and South Coast Railway Company* (2); *Foxwell* v. *Webster* (3).

Secondly, we say that the transactions impeached by the bill were not *ultrà vires*. They were capable of confirmation by the shareholders, and in such a case one shareholder cannot sue on behalf of all, when a majority of them dissent from him: *Foss* v. *Harbottle* (4).

Thirdly, the whole interest of the Plaintiff in the subject matter of the suit has been taken away by the proceedings in the voluntary winding-up, which are clearly binding on the Plaintiff, though dissenting. If he is entitled to any relief, he can obtain it in the winding-up under the *Companies Act*, 1862, sections 161, 162. The suit, therefore, must be stayed: *Hay* v. *Bowen* (5); *Parbury* v. *Chadwick* (6); *Elsey* v. *Adams* (7); *Pyke* v. *Halcombe* (8).

The Plaintiff does not impeach the winding-up resolutions by his bill, and the Court cannot speculate as to his amending his bill to make a case of which there is at present no suggestion.

(1) 9 W. R. 818, 7 Jur. (N.S.) 887
(2) 1 H. & M. 489.
(3) 12 W. R. 94, 186; 2 De G. F. & J. 250, 9 Jur. (N.S.) 1102, 10 Jur. (N.S.) 137.
(4) 2 Hare, 461.
(5) 5 Beav. 610.
(6) 12 Beav. 614.
(7) 2 D. J. & S. 147, 10 Jur. (N.S.) 458
(8) 9 Jur. 368.

1858 4 De G. & J. 77

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The Court, under a voluntary winding-up, has a discretionary power of restraining proceedings against the company: *In re Sablonière Hotel Company* (1).

Mr. *Wickens*, for the Defendant *Seymour*.

Mr. *Glasse*, Q.C., and Mr. *Cracknall*, for the Plaintiff, were not called on.

SIR G. J. TURNER, L.J.:—

In every case of this description, we must consider what is the nature of the case made by the bill. In the present instance, the bill complains of a gross fraud which the Plaintiff alleges to have been committed upon a company of which he is a member. The persons now moving to take the bill off the file are Mr. *Grant* and the company, the alleged parties to the fraud. They have not thought fit at present to put in any answer to the bill, with the exception of an answer raising the personal exception to the Plaintiff, which is one of the grounds of the present motion. There is, therefore, nothing before the Court disputing the allegations of fraud contained in the bill. In this state of circumstances, the question is, whether the Court ought to interfere upon motion, as it is now asked to do, to stop this suit.

In the first place, on what basis would the Court proceed in acceding to such a motion? It cannot at this stage of the proceedings be assumed as against the Plaintiff, that the allegations of fraud made by the bill will necessarily be wholly displaced in the suit. Suppose that answers are put in which should contain a direct admission of the alleged fraud. Is it to be said that, if those facts were altogether admitted, the Court would interfere at once, *brevi manu*, to stay the proceedings or dismiss the bill?

But it is said that everything which is sought by the bill could be obtained in the winding-up proceedings. The first observation upon that is, that the resolutions to wind up the company were passed after the institution of the suit. The second observation is, that we are in total ignorance of the circumstances under which the resolutions to wind up the company were passed, whether these

(1) Law Rep. 3 Eq. 74.

alleged frauds were or were not brought to the attention of the meeting. The validity of those resolutions may possibly be open to dispute upon the bill as it now stands, and if it is not, the bill might be amended for the purpose of raising the question, and it might then appear that these resolutions were passed for the express purpose of evading these charges of fraud. Another very material circumstance is this: that if the suit goes on, it will be quite in the discretion of the Court whether these charges shall be worked out in the suit or in the winding-up proceedings; and yet we are asked to stop the suit at once, on the assumption that it will be more advantageous to the company that the proceedings should be carried on under the winding-up than in the suit. I can at present see no foundation for that conclusion.

But the strongest argument which has been used in support of the motion is what may be called the personal exception to the Plaintiff. Now I by no means approve of the Plaintiff's conduct; but the question is, whether his conduct has been such as to deprive him of all right whatever in this suit? The Plaintiff's case is, that he has sustained great loss by speculating in the shares of the company, and that he afterwards purchased a small number of its shares, and then filed this bill to impeach certain transactions by the manager of the company. Now, although I by no means approve of such conduct, yet I cannot venture to say that for this reason the Court ought to interfere upon motion to deprive a Plaintiff of his rights, if, upon the hearing, he should appear to be entitled to anything.

Another objection that has been taken is the insignificance of the Plaintiff's interest in the subject matter of the suit. He is, however, suing on behalf of himself and the other shareholders of the company, and I am not prepared to say that the ordinary rule as to suits for a subject matter of less value than £10 applies to a case of this kind. I see no reason for dissenting from the conclusion of the Vice-Chancellor. I might be inclined to go even farther than he has done, and to say, that even if a sufficient answer had been put in, a motion of this kind could not be acceded to. It is sufficient, however, to rest the refusal of the motion upon the ground that no answer has been put in. I must add, however, that questions of fraud are proper to be tried at the hearing of the cause,

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and not on such an application as this. The motion must be refused with costs.

LORD CAIRNS, L.J.:—

This motion is one of a very novel, but of a very important character, because it asks the Court to shut the door in the face of the Plaintiff, not on the merits of the case, but on the ground that he has by his conduct disentitled himself to institute the suit. The theory of the law of this country is, that every subject has a right to bring his complaint to a hearing, if it be not capable of being stopped by a demurrer or a plea. The exceptions which have been established to this rule merely shew the strength of the general rule. Those exceptions are four in number:—First, where the Plaintiff is required to give security for costs. That is hardly an exception, because the Court only stays the proceedings in the suit until the security is given. Second, where the Defendant is willing to give to the Plaintiff all the relief which he asks, and to pay his costs of the suit. Third, where the subject matter of the litigation has perished, or has been removed, and nothing remains to be decided but the payment of costs of the suit. There the Court considers that it would be useless to allow the suit to go on to a hearing when the only question to be determined can be as well decided upon motion. Fourth, where the bill has been filed without the authority of the person who appears as the Plaintiff, or where the name of a corporation has been used without a sufficient title to use it. In such a case the bill is treated as a fraud upon the Court, and is therefore ordered to be taken off the file.

The grounds alleged for the present motion are three:—First, a personal exception to the Plaintiff. I do not think that I unfairly represent the conclusion which the parties desire to draw from the cross-examination of the Plaintiff if I put it in this way. The Plaintiff had in a collateral way lost some money, and he then finds a blot in the management of the company of which he thinks the shareholders might complain. He buys five shares in the company, and then files this bill, in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this Court, or, indeed, in any other Court, and such conduct might be material at the hear-

ing with reference to the amount of relief which the Plaintiff could obtain, or whether he was entitled to any relief at all. But the question is, whether these facts are necessarily fatal to the Plaintiff's claim to relief? Suppose an answer were put in admitting all the allegations contained in the bill, it would be difficult to say at this stage of the suit that the Plaintiff's conduct would altogether disentitle him to relief. The case of *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway* (1), which was relied upon in the argument, is distinguishable from the present case upon two grounds: first, because that was the hearing of the cause; and, secondly (and this is the main distinction), because there the Court came to the conclusion that the Plaintiff was simply a puppet in the hands of another company, and that he was indemnified by that company against the costs of the suit. That objection amounted to this, that a suit professing to be the suit of Company *A.*, was really the suit of Company *B.*

The second ground relied on in support of this motion was, that the Plaintiff's *quantum* of interest in the suit was very insignificant. But if we should hold that the suit can be maintained in other respects, I think that the aggregate interest of all the shareholders in the subject matter of the suit is amply sufficient to sustain the suit.

The third ground relied upon is the resolution which has been passed to wind up the company voluntarily, and it is said that the consequence of that resolution is that the company is at an end, or that, at any rate, if any relief is to be obtained, it can be obtained in the winding-up proceedings. I give no opinion how the matter would stand if it were admitted that a winding-up of the company, either voluntarily or compulsorily, had taken place. But the complete answer to this ground of objection is this, that the bill in substance impeaches the proceedings which have been taken to wind up the company. Before the bill was filed, two circulars respecting the intended proceedings in relation to the winding up were sent to the shareholders. The bill contains allegations directed to the invalidity of the proceedings, and a part of the prayer is for a declaration to the same effect. The allegation could not at that time have been more definite than it was;

(1) 9 W. R. 818; 7 Jur. N. S. 887

L. JJ. 1867 SEATON v. GRANT.

but a clear intention is shewn on the part of the Plaintiff to challenge the proceedings to wind up the company. At any rate, the time for amending the bill has not yet come, and, therefore, I think that we are bound to take it that the Plaintiff may be able to shew that the winding-up proceedings are invalid. I think, therefore, that all the grounds that have been stated in support of the motion fail. I do not go into the question of delay, because I prefer to rest the case on the other grounds. I think that the motion should be refused, with costs.

Solicitor for the Plaintiff: Mr. *Edwin Smith.*

Solicitors for the Defendants: Messrs. *Newbon & Evans;* Messrs. *Bircham & Co.*

L. JJ. 1867 *March* 5, 15.

In re CLELAND.

Bankruptcy—Trading—Slate Quarry—Dealing in Shares—Trading out of the District.

The lessee of a quarry who digs rock, and works it up into slates for sale, is not thereby made a trader within the meaning of the bankrupt laws.

Nor is he so made a trader by selling tools and gunpowder to his workmen, nor by letting a builder have iron and timber to be used in buildings on the quarry.

Dealing in shares in joint stock companies is not trading under the bankrupt laws.

A trading out of any district will support an adjudication in the district.

THIS was a motion, by way of appeal from an order of Mr. Commissioner *Perry*, to have an adjudication of bankruptcy annulled.

The bankrupt, *William Cleland*, had taken a lease of about 300 acres of mountain land in *Wales*, and had opened a slate quarry, covering about five acres, where slates were dug by him under his foreman, and were worked up so as to be fit for use, and sent down to *Port Madoc* for sale. At the quarry he supplied the workmen with tools, and with gunpowder for blasting, and charged them for the articles so supplied. He had also bought some iron for the purpose of making a tramway, and had sold some of it which was not wanted by him. The petitioning creditor had been em-

ployed to build a kind of barrack on the quarry, and the bankrupt had twice sold him some iron for the purpose, and had charged him for making up the iron at the forge there, and had also let him have some timber for the building, all which was taken into the account between them, but no money passed. The bankrupt had only sold tools and gunpowder to his own workmen, and it was stated that all owners of quarries did so, as otherwise the men could not get supplied, and would not work. There was some controversy as to whether the tools and gunpowder were sold at a profit, or only so as to cover the expenses.

The petitioning creditor, Mr. *Evan Davies*, had levied an execution by seizure of the goods and chattels of the bankrupt, upon a judgment recovered in an action for £256, and this was relied upon as the act of bankruptcy under sect. 73 of the *Bankruptcy Act*, 1861, which only applies to traders. The adjudication was disputed before the Commissioner on the ground that the bankrupt had not been a trader; and, besides the facts above stated, the petitioning creditor, when before the Commissioner, wished to prove by evidence that the bankrupt had traded out of the district of the Commissioner; but the Commissioner was of opinion that he could not receive such evidence. He considered that the other acts above stated did not amount to trading, but that the sale of the iron to the petitioning creditor was a sufficient trading, and the adjudication was confirmed.

The bankrupt appealed.

Mr. *De Gex*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

By the interpretation clause of the *Bankruptcy Act*, 1861, the same persons are deemed traders as were so under the *Bankruptcy Act*, 1849, and no alteration has taken place in this respect in the different Acts which have been passed since 6 Geo. 4, c. 16, s. 2.

The Commissioner concluded that *Cleland* came under the provisions of the 65th section of the *Bankruptcy Act*, 1849 (1), which

(1) The 65th section, so far as it is material, is as follows:—"That all alum makers, apothecaries, auctioneers, bankers, bleachers, brokers, brickmakers, builders, calenderers, carpenters, carriers, cattle or sheep salesmen, coach proprietors, cowkeepers, dyers, fullers, keepers of inns, taverns, hotels, or coffee houses, lime burners, livery stable keepers, market gardeners, mil-

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includes among traders those who seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities; but mere selling iron and timber for the convenience of a man's own builder, is not trading. Nor is quarrying rock and working it up into slates, where a man is merely selling the product of his land: *Ex parte Gallimore* (1); *Patman* v. *Vaughan* (2); *Ex parte Burgess* (3). Every nobleman and gentleman who owns quarries acts as *Cleland* did, and there is no other way of working slate quarries.

Mr. *Bacon*, Q.C., and Mr. *Yate Lee*, for the petitioning creditor:—

This bankrupt clearly manufactured rock into slate and sold it, and that is no enjoyment of land; besides, he was only the lessee of the land, and, in fact, bought rock and worked it into slate, and sold it. It is useless to refer to decisions on the statutes before 6 Geo. 4. He was not a farmer, and had only a right to take rock and sell it. In *Ex parte Burgess*, and *Ex parte Dering* (4), the bankrupt could do what he pleased with the land. In *Wells* v. *Parker* (5) it was decided that if a man had no interest in the soil until it was separated, he was a trader. If the bankruptcy is annulled, there are judgment creditors who will sweep away all the assets.

SIR G. J. TURNER, L.J.:—

This petition is presented by the bankrupt, in order to annul the adjudication against him. The bankrupt, as it appears, took a lease of a slate quarry in *Wales*, and carried on there, in a

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lers, packers, printers, shipowners, shipwrights, victuallers, warehousemen, wharfingers, persons using the trade or profession of a scrivener receiving other men's moneys, or estates, into their trust or custody, persons insuring ships, or their freight, or other matters, against perils of the sea, and all persons using the trade of merchandize, by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail, and all persons who either for themselves, or as agents or factors for others, *seek their living by buying and selling*, or by buying and letting for hire, *or by the workmanship of goods or commodities*, shall be deemed traders liable to become bankrupt.

(1) 2 Rose, 424.
(2) 1 T. R. 572.
(3) 2 Glyn & J. 183.
(4) De G. 398.
(5) 1 T. R. 34, 783.

sense, the manufacture of slates, which he sent down to *Port Madoc* for sale, and engaged in other matters arising thereout, and the adjudication of bankruptcy was founded upon that being a trading by him.

Now, before the passing of the Act 6 Geo. 4, c. 16, the *Bankruptcy Act* defining trading was in these words, "persons who seek their living by buying or selling;" and it was settled that if a man purchased land and sold the proceeds of that land, that was not a buying and selling within the meaning of the *Bankruptcy Act*. So again, if he took a lease of land, and employed the proceeds of that land for trading purposes, that was not a buying and selling within the meaning of the *Bankruptcy Act*. The point came before Lord *Eldon* in *Ex parte Gallimore* (1), which is, therefore, a distinct authority that before the introduction of the words "or by the workmanship of goods or commodities," a lessee who had taken land for the purpose of converting it into articles for sale, was not a trader within the meaning of the *Bankruptcy Acts*. That is all well settled, and we would not indicate the slightest doubt upon the subject. Then the question is, whether the introduction of these words, "or by the workmanship of goods and commodities," in the 2nd section of the Act, 6 Geo. 4, c. 16 (which words have since been repeated in every *Bankruptcy Act*) could make any difference, and I cannot see my way to say that they do make any difference, because the workmanship of the goods and commodities is not a taking of the land, which is one distinct subject. When he has got the interest in the land, then the workmanship on the material begins, and not until then. Therefore I do not see how the introduction of these words can bring the case of a lessee working up his materials which are drawn from the land, within the statute, when it would not have been so as the law formerly stood. It seems to me that the purchase of the land has nothing to do with the question of the workmanship of goods and commodities. I think, therefore, that upon such trading we cannot in any way maintain the adjudication, and we agree with the Commissioner upon that point. But then it is said that the bankrupt traded further, and did several acts, to some of which the Commissioner attached no importance, but upon one of which

(1) 2 Rose, 424.

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he relied. It appears that the bankrupt was in the habit of charging his workmen in account for tools, and also for gunpowder supplied to them, but, in my opinion, that is not a trading at all. It was only a mode of paying his workmen, and was only a matter of contract between them, and cannot be considered as a buying and selling within the meaning of the Act. *Ex parte Gallimore* (1) seems to have decided that very same point also.

The point, however, upon which the Commissioner ultimately decided appears to have been this:—

For the purpose of carrying on his business of preparing slates he required iron for making tramways, &c.; and, according to the provisions of the lease, he had liberty to build a certain house or barracks. He had some spare iron, and came to an arrangement with the petitioning creditor by which this spare iron was to be employed by the petitioning creditor in building this house, and then, in the account between them, the petitioning creditor was charged with the iron at a price, and gave credit for it in the sum to be paid him. Now that was a single act, not done with any intent to carry on the trade of selling iron, and is no proof of any intent to carry on any such trade as selling iron. It never was the property of the petitioning creditor, for it was only sold to him for the purpose of building the house; and I cannot think that this was an act of trading.

Upon these facts, then, as they stand, there must be an order to annul the adjudication. But then it appears that in the course of the proceedings before the Commissioner, in shewing cause against the adjudication, there was a proposition made by the petitioning creditor to shew that, though the bankrupt might not have traded within the *Liverpool* district, he had in fact carried on trade elsewhere. The Commissioner, upon a question being put on that subject, stopped the evidence, and declined to receive any evidence of trading except within the *Liverpool* district. But I see nothing in the Act which precluded him from receiving such evidence. The whole inquiry, therefore, whether there has been a trading on the part of the bankrupt, has not ever been prosecuted; because if he traded elsewhere the plea can be maintained; if he did not, it cannot.

We are not now in a position to pronounce upon the fact, and

(1) 2 Rose 424.

the only order now to be made will be to direct the application to stand over, and refer it back to the Commissioner to prosecute the inquiry as to the trading.

LORD CAIRNS, L.J., concurred.

March 15. The case again came before the Lords Justices on the result of the further inquiry before the Commissioner respecting acts of trading by the Appellant, *William Cleland*, in *London*.

It appeared, from the examination of the Appellant before the Commissioner, that the Appellant was, previously to the month of October, 1866, the salaried secretary and manager of the *European Assurance Company*, in *London*, and that he was in the habit of buying shares in the company, and selling them to various persons; but he stated that he had never bought and sold them in the character of a broker, or received any commission upon them, but that he had bought them from friends who were anxious to dispose of them, and had sold them as the secretary of the company, without any compensation beyond his salary.

Mr. *De Gex*, Q.C., and Mr. *Locock Webb*, for the Appellant:—

The course of dealing of the Appellant with respect to the shares in the insurance company did not constitute a trading within the meaning of the bankrupt laws. He did not deal in shares generally, but only in the shares of the company of which he was secretary. Nor did he act as a broker or factor, for he received no commission or remuneration for his dealings. Nor can it be said that he got his living by buying and selling shares, for he did not buy and sell them for profit, but as secretary of the company, and to oblige his friends: *Patman* v. *Vaughan* (1); *Ex parte Harvey* (2). But if he had dealt in shares generally, the dealing in shares is not trading within the Act. The words "buying or selling," in the 65th section of the *Bankrupt Law Consolidation Act*, 1849, are coupled with the words "goods and

(1) 1 T. R. 572. (2) 2 Mont. & A. 593.

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commodities," which cannot apply to shares: *Colt* v. *Nettervill* (1); *Knight* v. *Barber* (2).

Mr. *Bacon*, Q.C., and Mr. *Yate Lee*, for the petitioning creditor:—

The Appellant was a trader, both as a broker or factor for others, and as a dealer in shares. There are no cases that decide that buying and selling shares is not trading within the bankrupt laws. *Colt* v. *Nettervill* only decided that a dealer in *East India* Stock could not be made a bankrupt, because that stock was created by a special statute.

The words "buying and selling" stand by themselves, and have no connection with the words "goods and commodities." In the old *Bankruptcy Act* of the 21st Jac. 1, c. 19, s. 2, the words are, "Every person using, or that shall use, the trade of merchandize, by way of bargaining, exchange, bartering, chevisance, or otherwise, in gross or in retail, or seeking his or her living by buying and selling, or that shall use the trade or profession of a scrivener," &c., where the words "buying and selling" are used absolutely. Although the grammatical construction of the section now in question is confused, yet it is clear that "buying and selling" is mentioned as one of the modes in which persons may "use the trade of merchandize."

[They also referred to the 13 & 14 Car. 2, c. 24, exempting persons investing money in the *East India, Guinea Company*, or *Royal Fishing Trade*, from the operation of the bankrupt laws; and to the 5 Geo. 2, c. 30, s. 39, making bankers, brokers, and factors subject to bankruptcy.]

SIR G. J. TURNER, L.J.:—

The question in this case arises on the construction of the 65th section of the Bankruptcy Act of 1849. The first point is, whether the Appellant can be considered to be a broker under the early part of the section. It does not seem to me that the dealing in this case amounts to such a dealing as would justify us in considering him as a broker. He was the secretary of an insurance company, and he seems to have dealt largely in the shares

(1) 2 P. Wms. 304, 308. (2) 16 M. & W. 66.

of the company, and occasionally, when his friends wanted to sell shares, he acted for them in the sale of those shares; but I do not think there is sufficient evidence to shew that he can be considered to have been a broker, dealing generally, so as to bring him within the meaning of the Act.

Then, if he was not a broker, there arises the question, whether he is to be considered as a person "using the trade of merchandize by buying and selling;" the argument of the Respondent being that the words "using the trade of merchandize" in the earlier part of the section are to be carried on to the latter part of the section, so as to enact that any person using the trade of merchandize by buying and selling shall be considered to be liable to the bankrupt laws.

Now, it is to be observed that the earlier part of the section deals entirely with the participle. It says: "All alum makers, &c., and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail"—to that point the section deals wholly with the participle. But there the section breaks, and the indicative mood is used: "and all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities." Now from the use of the participle down to a certain point in the sentence, and from the sentence then breaking off into the indicative mood, I think it is to be considered that something different was intended from what would have been the result if the participle had been continued. It is also to be observed that the words, "and all persons who either for themselves, or as agents or factors for others, seek their living," were not necessary to be inserted in the Act at all if the words "using the trade of merchandize" were to be carried on; for then the sentence would have run thus: "all persons using the trade of merchandize by way of bargaining, exchange, &c., or otherwise, in gross or by retail, or by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities." Therefore, the *primâ facie* meaning of the Act must be, that something different was intended by the introduction of the words, "all persons who either for themselves, or as agents or factors for others,

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seek their living by buying and selling;" and the words "using the trade of merchandize" cannot be carried on so far as to apply to the words "seek their living by buying and selling."

Then, taking that view of the case, the next consideration is, whether this gentleman is to be considered as a person "who either for himself, or as agent or factor for others, sought his living by buying and selling"—and I stop there in the first instance. Now I think it clear that some limit must have been intended to have been put, and must be put, on the words "by buying and selling," for otherwise any person who bought and sold land would be a trader and liable to the bankrupt laws, which is plainly not the case. If, then, you are to put any limit on the words "buying and selling," what is to be that limit? The section goes on, "or by buying and letting for hire, or by the workmanship of goods or commodities." Here, then, we have the words "of goods or commodities," which may be applicable equally to the buying and selling, to the buying and letting for hire, and to the workmanship. I cannot see any reason for holding that those words, "goods or commodities," do not apply to each of the three members of that sentence.

Then the question is, are these shares "goods or commodities" within the meaning of this Act of Parliament? and I cannot say they are. They are not goods or commodities which at the time of the passing of this Act, whatever the law may be now, could be taken in execution. They could not be dealt with by the sheriff, and I do not think they could be fairly considered to be "goods or commodities;" they are no more than choses in action.

One view of this case, which has struck me rather strongly in the course of the argument, as opposed to the view that this gentleman can be considered as a trader, is, that in the Act of *James* I. (1) the words are by "buying and selling" only, without reference to "goods or commodities" at all, and yet, though the words are "all and every person using the trade of merchandize by way of bargaining, exchange, bartering, chevisance, or otherwise, in gross or by retail, or seeking his or her living by buying and selling," it seems to have been considered by the Legislature

(1) 21 Jac. 1, c. 19.

necessary, in order to bring brokers, bankers, and factors within the bankrupt laws, that an express enactment should be made by the statute of 5 Geo. 2, c. 30, whereas if they were within those words before there was no necessity for that Act.

It seems to me, therefore, that in this case there has not been any such trading as will bring this case within the bankrupt laws, and that this decision of the learned Commissioner must be reversed and the adjudication annulled.

LORD CAIRNS, L.J. :—

I am of the same opinion. As to the question whether the person who has been adjudged bankrupt in this case is or is not a broker within the meaning of the section, that is really a question of fact to be decided on the evidence brought before us for the first time to-day, and as I gather the result of that evidence it is this—that Mr. *Cleland*, who is the witness whose evidence is really material, says that he was in the habit of buying shares, on his own account in some few instances, to sell them again, but that over and above that he sold shares for friends of his without himself becoming a purchaser of them. He denies that, according to his view of what a broker is, he acted as a broker in respect of those shares, and it is not proved that he received brokerage in any way, or undertook to perform any duty except that gratuitous duty of assisting his friends to part with shares which they wished to sell. That alone would not be sufficient to constitute him that which is described in this section by the term "broker," which has a distinct and particular meaning.

Putting, therefore, that question aside, we come to the construction of the section. I do not mean to say that the section is by any means free from doubt, but I have arrived at the same conclusion as the Lord Justice. The section in substance may be divided into three parts. The first is an enumeration of particular occupations which are to subject the holder of them to the bankrupt laws. The enumeration seems rather to be on the principle of pointing out specifically persons as to whom you would not have said they were traders, or liable to the bankrupt laws; for example, market gardeners and brick makers, and a variety of others who in former times were not supposed to be liable to a bankruptcy.

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Then having passed from that enumeration, we come next to the general description of all persons "using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail." Now, that part of the section I rather read as meaning to embrace the large class of regular merchants of the country who would not have come under any of the enumerations of specific trades which we have before, and who are pointed out as persons using the great trade and occupation of the country, that of merchandize. In my opinion nothing done by Mr. *Cleland* in this case would lead to the conclusion that he was a person "using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail." It was not his occupation, it was not his trade; he did not profess to be one of the merchants or traders of the country. If he, therefore, is to be brought under the section, it must be under the third part of the sentence, which I next proceed to consider, "And all persons who either for themselves, or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities."

Now the question is, whether the words "goods and commodities" are to be connected with the three parts of the sentence, "buying and selling," "buying and letting for hire," and "workmanship," or are to be connected with "workmanship" alone. In my opinion they are to be connected with the three members of the sentence, "buying and selling," "buying and letting for hire," and "workmanship," otherwise you would have the words "buying and selling, or buying and letting for hire," without any qualification whatever to confine them to those cases which alone have been held under this statute to lead to bankruptcy. For example, you would have to apply the section to the case of persons who seek their living by buying and selling land. There are such persons in the country—persons who buy houses to sell again, and make profit in that way: and in like manner you would have to apply the words "buying and letting for hire" to the case of a person who bought a house and let it out, and it is perfectly well known that to those cases this Act has been held not to apply. No limit can be given to the words, except by holding that the verbs intro-

duced into the sentence govern the substantives at the end, "goods and commodities."

Then the only question remaining is, were the shares which this gentleman was in the habit of buying and selling "goods or commodities" within the meaning of the section? It is to be remembered that "goods or commodities" are technical words—they are words that have been used in other Acts of Parliament, and they are certainly very much akin to the words used in the sheriff's writ, and the words used in the *Statute of Frauds*, "goods, wares, and merchandize," which are words certainly as comprehensive and extensive as the words "goods or commodities." Now, it is perfectly well settled that with regard to those words in the documents to which I have referred, namely, the sheriff's writ and the *Statute of Frauds*, they do not include shares. In point of fact, such a thing as a share in a joint stock company was then hardly known. Therefore I think that these words, having this technical use, must be confined to the meaning which they have always hitherto received, and must exclude shares which are merely choses in action.

I am of opinion, therefore, that the case of Mr. *Cleland* does not come within this section, and that the adjudication cannot be maintained. The order of the Commissioner, therefore, must be reversed.

Solicitor for the Appellant: Mr. *F. P. Chappell.*
Solicitors for the Respondent: Messrs. *J. T. & R. Gole.*

L. C.

1867

March 15, 16
April 16, 17, 18, 24;
May 2.

CROSSLEY AND SONS, LIMITED *v.* LIGHTOWLER.

Riparian Proprietors—Fouling Water—Prescription—Additional Nuisance—Abandonment of Easement—Injury—Reservation of Rights.

Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people.

The fact that the stream is fouled by others, is not a defence to a suit to restrain the fouling by one.

The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin:—

Held that any right of fouling a stream attached to them was lost.

The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without shewing that the fouling is actually injurious to him.

C. wishing to prevent the water of a river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river, without communicating to them his object:—

Held, that in the absence of any express reservation by the owners of the dye-works of the right of fouling, *C.* could maintain a suit to restrain it.

Decree of *Wood*, V.C., affirmed with variations.

THE Plaintiffs in this case, a company called *Crossley & Sons, Limited*, had a large carpet manufactory at *Dean Clough*, on the banks of the river *Hebble*, and had lately bought from the Defendants, Messrs. *Edleston*, a piece of land also on the banks of the *Hebble* and above *Dean Clough*. The Defendants, Messrs. *Lightowler*, who were the tenants of the Defendants, Messrs. *Edleston*, had, in 1864, established large dye-works still higher up the river, and this bill was filed to restrain the Defendants from fouling the water of the river, both with respect to the carpet manufactory and with respect to the piece of land.

The Defendants alleged, first, that there had, up to the year 1840, or 1844, been dye-works on the same place where their present works were, and that they had a prescriptive right to foul the stream; secondly, that there were many other manufactories on the river by which the river was so fouled as to make the fouling by the Defendants immaterial; thirdly, that the water actually used by the Plaintiffs in their works was not taken from

the river as it flowed past their manufactory, but came through a pipe from a higher part of the stream; fourthly, that the Plaintiffs, when they bought the piece of land, were perfectly well aware that the water was fouled by the Defendants, and must have taken the land subject to the fouling; and fifthly, that the piece of land was bought by the Plaintiffs on purpose to enable them to set up this claim.

The Plaintiffs replied, as to the first point, that the dye-works had been discontinued since 1839 or 1840, and that the Defendants had therefore lost whatever rights of fouling might have been attached to the old dye-works; and also that the present dye-works were very much larger than the old dye-works.

On all the questions of fact in dispute, a great quantity of evidence was entered into, and the suit came to a hearing before the Vice-Chancellor *Wood*, who, on the 13th of November, 1866, made a decree for an injunction, directed an inquiry as to damages, and ordered the Defendants to pay the costs (1).

The Defendants appealed, and the appeal now came on to be heard. The facts of the case are stated at length in the report of the case in the Court below, and, in addition to the arguments and cases given below, all the arguments used and cases cited before the Vice-Chancellor were used and cited on the hearing of the appeal.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Kay*, Q.C., for the Appellants:—

The Plaintiffs have not shewn that the water used by them is taken from the stream as it flows past their works, and if it is not, they have suffered little or no damage, and must be left to their remedy at law: *Rochdale Canal Company* v. *King* (2); *Attorney-General* v. *Sheffield Gas Company* (3). The piece of land is not damaged at all by the dirty water; moreover, it was bought with full knowledge of the state of things, and is subject to this servitude: *Ewart* v. *Cochrane* (4). The purchase was a scheme by the Plaintiffs to acquire a right, and the Defendants were never told what the motive for buying the land was: a Court of Equity will not encourage such proceedings.

(1) Law Rep. 3 Eq. 279.
(2) 2 Sim. (N. S.) 78; 15 Jur. 962.
(3) 3 D. M. & G. 304; 17 Jur. 677.
(4) 4 Macq. 117; 7 Jur. (N. S.) 925.

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Sir *Roundell Palmer*, Q.C., Mr. *G. M. Giffard*, Q.C. and Mr. *C. Hall*, for the Plaintiffs:—

The Defendants cannot exercise the right of fouling to a greater extent than was formerly enjoyed: *Murgatroyd* v. *Robinson* (1); *Stockport Waterworks Company* v. *Potter* (2); *Nuttall* v. *Bracewell* (3).

Messrs. *Edleston* have reserved nothing in the conveyance of the piece of land, and the purchaser takes it with all its rights: *Berridge* v. *Ward* (4); *Lord* v. *Sydney* (5). *Pyer* v. *Carter* (6) received no countenance from the House of Lords in *Ewart* v. *Cochrane* (7), and is besides distinguishable. The question must depend upon the terms of the conveyance: *White* v. *Bass* (8); *Suffield* v. *Brown* (9); *Elliott* v. *North-Eastern Railway Company* (10).

As to leaving the parties to law, that is altered now, for the Act 24 & 25 Vict. c. 42, was passed on purpose to avoid that difficulty. Nor is it at all necessary that the Plaintiff should actually use the water in order to entitle him to an injunction: *Sampson* v. *Hoddinott* (11); *Bickett* v. *Morris* (12).

The *Attorney-General*, in reply:—

Though the Court has now power to assess damages, it is under no obligation to do so, and where the rights are purely legal, as here, may leave the parties to establish their claims at law. This is a demand for a perpetual injunction, the right to which must depend upon the legal title.

May 2. LORD CHELMSFORD, L.C., after stating the principal facts of the case, continued:—

The first question to be determined in this case is, whether the Messrs. *Irving*, the occupiers of the former dye-works, had acquired a prescriptive right to foul the stream. The evidence appears to

(1) 7 E. & B. 391,
(2) 3 H. & C. 300,
(3) Law Rep. 2 Ex. 1.
(4) 10 C. B. (N. S.) 400,
(5) 12 Moo. P. C. 473.
(6) 1 H. & N. 916.
(7) 4 Macq. 117; 7 Jur. (N. S.) 925.
(8) 7 H. & N. 722,
(9) 10 Jur. (N. S.) 111.
(10) 10 H. L. C. 333,
(11) 1 C. B. (N. S.) 596.
(12) Law Rep. 1 H. L., Sc. 47,

me to be sufficient to establish that for twenty years prior to 1839, when the dye-works were discontinued, the foul water from those works had been discharged into the stream. The extent to which the fouling of the water took place in Messrs. *Irving's* time cannot of course be absolutely determined, but, looking to the evidence on the subject, it appears to me that although similar in kind, it was considerably less in degree than since the Defendants' works have been in operation. The Defendants contend that whatever may be the increased extent of the Messrs. *Lightowlers'* buildings, or of their business, their rights must be measured by the means which they had of discharging their foul water into the *Hebble,* and that if the watercourses which Messrs. *Irving* used have not been enlarged, and the means of discharge into the stream have remained the same, the Plaintiffs have no ground of complaint. In answer to this argument, however, it may be observed that the right upon which the Defendants insist is, not to pour water, but to pour foul water into the *Hebble.* It may be difficult to fix a limit to such a right where the quantity of fouling to which the prescription extends has not been far exceeded, but where the excess is considerable the proof will be comparatively easy. The user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person.

But the Defendants contend that the Plaintiffs have no right to complain of any pollution of the *Hebble* occasioned by them, because there are many other manufacturers who pour polluting matter into the stream above the Plaintiffs' works, so that they could never have the water in a fit state for use, even if the Defendants altogether ceased to foul it. The case of *St. Helens' Smelting Company* v. *Tipping* (1), is, however, an answer to this defence. Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the Defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow, that if the Plaintiffs were to make terms with the other polluters of the stream so as to have water free from impurities produced by their works, the Defendants might say, " we began to

(1) 11 H. L. C. 642; 11 Jur. (N. S.) 785.

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foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to."

In the course of their argument the counsel for the Defendants insisted that the onus of proof upon the whole case, rested entirely upon the Plaintiffs. This is not quite correct. Upon the questions already mentioned, as to the prescriptive right to foul the stream derived by the Defendants from the Messrs. *Irving*, and as to the state of the water from other works preventing the Plaintiffs' complaint against the Defendants, these are answers to the Plaintiffs' suit which must be proved by the Defendants. The allegation by the Plaintiffs of the abandonment of the prescriptive right, supposing it to have ever existed, and the burthen of establishing their substantive case is, of course, thrown upon them.

It will be convenient to deal with the Defendants' justification of their acts, and the Plaintiffs' answer to it, before I proceed to the consideration of the grounds upon which the Plaintiffs' claim to an injunction is founded.

With respect to the prescriptive right derived from the Messrs. *Irving*, the Plaintiffs say, that if such right was ever acquired it had been abandoned long before the Defendants commenced business at their works. The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of *Reg.* v. *Chorley* (1), shews that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of a right. Lord *Denman*, in delivering the judgment of the Court in that case, said: "We apprehend that an express release of the easement would destroy it at any

(1) 12 Q. B. 515.

moment, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect without any reference to time." And again: "It is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement, and the intention in him which it indicates, which are material for the consideration of the jury." It is, therefore, a question of fact, whether the acts of the parties who succeeded the Messrs. *Irving* were of so unequivocal a nature as clearly to denote an intention to relinquish the right to foul the stream which they had exercised previously. [His Lordship then mentioned the facts and continued:—]

I think it clearly appears that as the premises were dismantled in 1839, and afterwards the buildings were gradually removed, there was no intention of erecting other dye-works upon the spot, to which the right of fouling the stream would have been continued. The case, therefore, put by Mr. Justice *Holroyd* in *Moore* v. *Rawson* (1), exactly applies.

The Defendants cannot justify their interference with the Plaintiffs' right to have the water of the *Hebble* in the state in which it would be without their additional pollutions. If, therefore, the Plaintiffs' bill is rightly framed, and they have proved their case as laid, they are entitled to an injunction to the full extent of the decree which they have obtained.

The Plaintiffs, by their bill, claim, as riparian proprietors, to have the use of the water of the *Hebble* in its natural state. This claim applies both to the part of the streams which flows past the *Dean Clough Mills*, and to the part of it near the piece of land which they purchased from the Defendants, and the rights of the Plaintiffs upon these different portions of the stream require to be separately considered.

From what has been already said, it may be collected that, in my opinion, if the Plaintiffs had proved the pollution of the *Hebble* opposite to their mills by the Defendants, they would have had good ground for an injunction, although they were not actually using the water for their business. But although the Plaintiffs, by their bill, assert their rights as riparian proprietors, the case which they prove is of an entirely different description. It appears from

(1) 3 B. & C. 332, 338.

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the evidence that the Plaintiffs, or their predecessors, in order to obtain a supply of pure water, some years ago entered into an arrangement with Messrs. *Pilling*, whose dye-works are higher up the stream, that the Plaintiffs should be permitted to lay down a pipe from their works to a point on the stream above the mouth of the foul water pipe from Messrs. *Pilling's* dye-works, by which they convey the water to their works before it can be fouled by the Messrs. *Pilling*.

The foul refuse from Messrs. *Pilling's* works, and also from Messrs. *Whitworth's* worsted mills, is discharged into the stream above the mills of the Plaintiffs. Whether the agreement with the Messrs. *Pilling*, however binding upon them, would enable the Plaintiffs to assert the right acquired under it in their own names against any persons fouling the water thus artificially obtained, is perhaps doubtful; but the Plaintiffs do not claim as the grantees of *Pilling*, but in their character of riparian proprietors, and the fouling which they prove, is not of the water which flows between the banks at *Dean Clough*, but of the supply which they draw to the mills through pipes from a higher source.

There is, indeed, no proof that the Defendants' works foul the water in that part of the stream which flows past the banks where the *Dean Clough Mills* stand. The affidavits on the part of the Plaintiffs are expressed in such a manner as to lead any one reading them, without a knowledge of the arrangement with Messrs. *Pilling*, to believe that the Plaintiffs were using the water of the stream as it ran by their mills. But when the source of their supply is known, it then becomes evident that the witnesses, in speaking of the fouling of the water by the Defendants, mean the water which is used by the Plaintiffs at their mills, and which is drawn from the stream above Messrs. *Pilling's* by the agreement with them.

This is clearly not an injury to the rights of the Plaintiffs as riparian proprietors.

The only remaining subject for consideration is as to the injunction granted by the Vice-Chancellor in respect of the piece of land purchased from the Defendants by the Plaintiffs through a Mr. *Whitehead*.

I think it sufficiently appears that the object of the Plaintiffs in

purchasing this piece of land was to protect the *Dean Clough Mills* from any fouling of the stream by the Defendants, and that they employed Mr. *Whitehead* to negotiate for the purchase, thinking that if they themselves appeared as the real purchasers their object might be defeated. The Plaintiffs did not deal as openly as they ought to have done in this transaction, but their mode of dealing cannot have any effect upon the rights which they acquired as purchasers. It is not an immaterial circumstance that, whether *Whitehead* was a real or pretended purchaser, the Defendants were informed by him that the land was wanted for a mill and dye-works. The Defendants would therefore know that pure water would be an essential requisite, and that if they had before been in the habit of polluting the stream, and intended to continue to do so, some express mention of their intention ought to be made. Before the conveyance the Defendants learnt that the Plaintiffs were the real purchasers of the piece of land, and, as one of the Defendants, *Robert Edleston*, states, "some inquiry was then made as to the object of the Plaintiffs in making such purchase, and attention was thereby drawn to the reservation of water contained in the draft conveyance, which it was thought was not sufficiently explicit." The reservation in the draft was in these words: "Saving nevertheless, and reserving hereout, unto the said *Dickenson Edleston* and *Robert Edleston* a right of taking and diverting water from the goit running through the same pieces or parcels of land to *Wheatly Corn Mill*, and also saving and reserving unto the said *Dickenson Edleston* and *Robert Edleston*, their heirs and assigns, any drains or watercourses existing in or running through the said pieces or parcels of land from the manufacturing premises of the said *Dickenson Edleston* and *Robert Edleston* in *Wheatley* aforesaid, and adjoining and lying to the west of the piece of land firstly hereinbefore described and expressed to be hereby conveyed towards and into the said goit or reservoir hereinbefore mentioned."

The manufacturing premises mentioned in this reservation were a fulling mill, and not the Defendant's dye-works. To this reservation it was proposed to add explanatory words, viz., "for manufacturing or other purposes," which was objected to, and not insisted upon.

It was contended, on the part of the Plaintiffs, that the right of

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fouling the water not being expressly reserved to the Defendants, the grantors of the piece of land, although an express reservation was contained in the grant, it could no longer be exercised against the Plaintiffs. The Defendants, on the other hand, insist that if an easement is apparent and continuous, no express reservation is necessary in a grant of the servient by the owner of the dominant tenement; and they relied on the case of *Pyer* v. *Carter* (1), where it was held that if the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burthen, of all existing drains communicating with the other house, without any express reservation or grant for that purpose. Lord *Westbury* however, in the case of *Suffield* v. *Brown* (2), refused to accept the case of *Pyer* v. *Carter* as an authority, and said, "It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation." I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it. The argument of the Defendants would make in every case of this kind an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity. Thus in the case put by the Court in *Clark* v. *Cogge* (3): "If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by law." But in this case there is no necessity, in the legal sense of that term, that the Defendants should have the right to continue to pollute the stream; why then should the law preserve the right to them when it is quite uncertain whether it was not intentionally abandoned in favour of the grantees?

(1) 1 H. & N. 916. (2) 10 Jur. (N. S.) 111. (3) Cro. Jac. 170.

The Plaintiffs' right to prevent the fouling of the stream by the Defendants, in respect of the land purchased from them, will probably have indirectly the effect of protecting from pollution the water which the Plaintiffs draw for the use of their dye-works by the agreement with the Messrs. *Pilling*, and this probably was one of the objects which the Plaintiffs had in view when they made the purchase, and will account in some degree for the mode in which they obtained the land through the agency of *Whitehead*. But if the Plaintiffs are entitled to an injunction in respect of the part of the stream which runs by this piece of land, I cannot refuse it, because it may have a consequential effect upon the rights of the parties in some other direction.

I think that the decree of the Vice-Chancellor must be affirmed, so far as it awards an injunction to restrain the Defendants from causing or suffering any foul water to flow from their dye-works into the river *Hebble*, above or within the limits of the land adjoining the river purchased by the Plaintiffs from the Defendants, and orders that the Defendants should pay the Plaintiffs the costs of the cause up to the hearing.

And that in all other respects the decree must be reversed.

Solicitors for the Plaintiffs: Messrs. *Emmets, Son, & Emmet*, agents for Messrs. *Wavell & Co., Halifax.*

Solicitors for the Defendants: Messrs. *Edwards, Layton, & Jaques*, agents for Messrs. *Ingram & Baines, Halifax.*

L. C.
1867
April 24, 25.

15 L.D. 172

TURNER *v.* BURKINSHAW.

Interest—Agent—Account.

An agent had the entire management of the affairs of his principal for several years, during which he was never called upon to account; errors were then discovered in some accounts furnished by him, and he paid a small sum admitted to be due, alleging that this was a final settlement, and that only a small sum, if anything more, was due. On a bill being filed, and the accounts being taken, a large sum was found due from him:—

Held that, under the circumstances, fraud not being proved, he was not chargeable with interest on the balances in his hands until the date of the certificate.

Order of the Master of the Rolls affirmed.

THE Plaintiff in this case, the Rev. *C. Turner*, was vicar of *Grasby*, and owner of considerable property in that neighbourhood. In the year 1842 he appointed the Defendant, *J. J. Burkinshaw*, his agent. In 1843 the Defendant's accounts were examined and allowed by the Plaintiff; but from that time until the year 1861, when the Defendant's employment ceased, no settlement of accounts ever took place between them. Accounts were, however, occasionally rendered by the Defendant, and in 1857 he brought in the Plaintiff debtor of £124. In 1861 the Plaintiff detected several errors in the Defendant's accounts, which were admitted by the Defendant. In 1861 and 1862 there were negotiations between the solicitors of the Plaintiff and of the Defendant, and they settled that £120 should be paid by the Defendant. This sum was accordingly paid, and the Defendant, in February, 1863, in answer to an application by the Plaintiff for further accounts, said that this payment was a final settlement, and declined to answer any further questions on the subject. The Plaintiff however discovered that considerable sums were due to him, and on the 13th of April, 1863, he filed the bill in this suit for an account. The Defendant, by his answer, said the £120 was paid as a final settlement; that the accounts ought not to be opened; that he was willing to account for all moneys received by him; and that there was not anything, or, if anything, only a small amount due from him as the Plaintiff's agent.

The cause was heard before the Master of the Rolls, who directed accounts to be taken. The accounts were accordingly taken, and the Defendant paid into Court during the progress of the suit £1400. The Chief Clerk, by his final certificate, found that a further sum of £2937 was due from the Defendant, which sum he also paid into Court, making altogether £4337 found due and paid by him. The Plaintiff proposed to charge the Defendant with interest on the balances in his hands at the end of each year. The Master of the Rolls, on the cause coming on for further consideration, ordered the Defendant to pay the costs of the suit, but refused to charge him with interest, except from the date of the certificate.

The Plaintiff appealed, and the Defendant also appealed against the disallowance of several sums which were claimed by him. The other material facts will be found stated in the judgment of the Lord Chancellor.

Mr. *Southgate*, Q.C., and Mr. *Nalder*, for the Plaintiff in his appeal:—

In order to simplify matters, we have calculated the interest on the balance in the Defendant's hands at the end of each year, which is a favourable mode for him, and we contend that he must pay that interest; or, at all events, interest from the time when the account was demanded, or the time when the bill was filed: *Beaumont* v. *Boultbee* (1); Lord *Hardwicke* v. *Vernon* (2). There was no arrangement that he was to keep these moneys in his hands, and he professed to keep none, but to have accounted for all: *Pearse* v. *Green* (3); *Crackelt* v. *Bethune* (4); *Mosley* v. *Ward* (5); *Mayor &c., of Berwick-upon-Tweed* v. *Murray* (6). The Plaintiff has actually been charged with interest by the bankers on his account as overdrawn, whilst the Defendant ought to have paid these sums into the bank. The costs of this suit will not be above £500, which the Defendant will have to pay, whilst he will have made upwards of £3000 by refusing to account and keeping this money. His agency ceased in 1861, and there is no excuse for him from that time, at all events.

(1) 5 Ves. 485; 7 Ves. 599; 11 Ves. 358.
(2) 4 Ves. 411; 14 Ves. 504.
(3) 1 Jac. & W. 135.
(4) 1 Jac. & W. 586.
(5) 11 Ves. 581.
(6) 7 D. M. & G. 497; 3 Jur. N.S. 847

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Mr. *Selwyn*, Q.C., and Mr. *Fischer*, for the Defendant:—

No doubt the accounts have been badly kept, and probably the Defendant is a heavy loser by it, but the Plaintiff would, in some shape, have had to pay for keeping the accounts. The Defendant was, in fact, the Plaintiff's banker, and it is not proved that he made any profit by these balances, which he was not bound to invest: *Attorney-General* v. *Alford* (1). Interest is only given where there has been either a contract or a demand: *Boddam* v. *Ryley* (2). No interest was allowed in *Blogg* v. *Johnson* (3).

Mr. *Southgate*, in reply.

The Defendant's appeal against the disallowance of certain items was then heard.

LORD CHELMSFORD, L.C., dismissed the Defendant's appeal with costs, and then delivered judgment in the Plaintiff's appeal, to the following effect:—

With regard to the appeal on the part of the Plaintiff against the certificate of the Chief Clerk, I must observe a little upon the extraordinary relations between the parties, which were of a most unusual character and description.

The Plaintiff, a clergyman, reposed such entire confidence in the Defendant, who was a farmer's son in the neighbourhood, as to entrust him with the uncontrolled management of all his pecuniary affairs. The course seems to have been—though no express arrangement to that effect is proved between the parties—that the Defendant should pay all moneys which he received on account of the Plaintiff into a bank at *Lincoln*. The Defendant had authority to draw upon that account to an unlimited extent, signing the cheques invariably in his own name, "For the Rev. *Charles Turner*." Mr. *Turner* himself never drew at all upon that account; but whenever he wanted money he applied to the Defendant for it, and was supplied according to his wants. This state of things continued between the parties for nineteen years, from 1842 to 1861. The Defendant's remuneration at first was £20 a

(1) 4 D. M. & G. 843; 1 Jur. N.S. 361 (2) 1 B. C. C. 239.
(3) Law Rep. 2 Ch. 225.

year. In 1851 the Plaintiff took a farm, and the Defendant undertook the management of it, £10 a year being added to his remuneration. It appears that very expensive draining, and other works, were executed on this farm under the Defendant's superintendence, by which the value of the farm was materially increased. Accounts were furnished by the Defendant, not regularly nor continuously, but from time to time. There were accounts rendered from 1842 to 1852. From 1852 to 1857 no accounts at all were delivered by the Defendant, and no complaint appears to have been made on the part of the Plaintiff that he received no account for those years. From 1858 to 1861, when the relation between the parties ceased, there were accounts delivered every year.

In the year 1861 the Plaintiff asked his father-in-law, Mr. *Sellwood*, a retired solicitor, to look into the accounts, and Mr. *Sellwood* discovered errors and omissions, and on the 13th of April, 1863, the Plaintiff filed this bill for an account, which account was decreed by the Master of the Rolls.

The Chief Clerk by his certificate found that there was a balance of £2337 due from the Defendant to the Plaintiff, which, with £1400 paid by the Defendant into Court under the order of the Court, made a sum of £4337. This sum, therefore, was the amount in the hands of the Defendant as the Plaintiff's agent.

On the case coming on for further consideration before the Master of the Rolls, the Plaintiff claimed to charge the Defendant with interest on the balance which was due to the Plaintiff at the end of each year, for the period over which the account directed by the decree extends. The Master of the Rolls refused to allow any such interest, except from the date of the certificate, and an appeal is made to me by the Plaintiff on that ground.

Now, on consideration of all the extraordinary circumstances of the case, I think the Master of the Rolls was right in the conclusion at which he arrived.

It is the first duty of an agent—as Sir *Thomas Plumer* said in *Pearse* v. *Green* (1), quoting the words of the Lord Chancellor in *Lord Hardwicke* v. *Vernon* (2),—to be constantly ready with his accounts. But this must mean that the agent must be ready to render

(1) 1 Jac. & W. 140. (2) 14 Ves. 504.

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his accounts when they are demanded. If no demand is made upon him, it is the simple case of an agent retaining money which he ought to pay over, but which he has not been required to pay; and there is no case, of which I am aware, where, under such circumstances, without anything more, the agent has been made to pay interest. In this case, the agent was, in a certain sense, the banker of his principal—keeping his money and supplying his wants when demands were made upon him. If, therefore, there was no fraudulent dealing with the money on the part of the Defendant, it appears to me that he ought not to be made liable for interest.

It was said, on the part of the Plaintiff, that the Defendant had falsely kept back and concealed sums of money which he ought to have accounted for and paid over. If he had dealt in this manner, he ought, unquestionably, to be made to pay interest to the Plaintiff. But the Plaintiff has not satisfied me that the Defendant has been guilty of any fraud. The Defendant is certainly a person who has not much experience in matters of account, and as to his not rendering any accounts, he seems to have been left very much to himself as to the time and mode of accounting. There were no accounts, as I have already observed, delivered by him from 1852 to 1857, and yet, during the whole of that time, no demand was ever made by the Plaintiff for an account, and no complaint has been made by the Plaintiff that the accounts were not rendered during that period.

If I could see any wilful withholding of the accounts, or any fraudulent falsification of them, I should, of course, consider that the Defendant ought to be charged with interest; but I see nothing in the case except a loose mode of dealing between the parties, the Plaintiff implicitly confiding in the Defendant and making him, as I have already observed, in a certain sense his banker, allowing him to operate upon the account at the bank at his will and pleasure—certainly leaving him in the uncontrolled management of the Plaintiff's affairs—the Defendant receiving and disbursing the Plaintiff's money to the extent of upwards of £70,000, according to the authority which was entrusted to him. Such an agent is undoubtedly bound to account whenever his principal chooses to call upon him to do so; but he is not liable to the

penalty of paying interest unless he has improperly withheld accounts and refused to pay over money in his hands when demanded, or has delivered fraudulent accounts. The Plaintiff who seeks to charge a Defendant with interest is bound to make out a case against him. I think he has failed in establishing such a case, and I agree with the conclusion which the Master of the Rolls arrived at, and am of opinion that his decree must be affirmed. I must do equal justice in this instance, and dismiss this appeal with costs.

Solicitors for the Plaintiff: Messrs. *Coverdale, Lee, & Co.*

Solicitors for the Defendant: Messrs. *C. & H. Bell*, agents for *W. H. Goy, Barton-upon-Humber.*

In re LEVI.

Bankruptcy—Prosecution for Misdemeanor—Costs of Prosecution of the Accomplices of the Bankrupt—Bankruptcy Act, 1861, *ss.* 221, 223.

Where a prosecution is directed against a bankrupt for a misdemeanor under the 221st section of the *Bankruptcy Act*, 1861, the costs, not only of the prosecution of the bankrupt, but also of the prosecution of his accomplices, will be allowed out of the Chief Registrar's Account.

30 L. J. 760
2 Ch. D. 80

THIS was an application by the assignees under the bankruptcy of *Morris Levi*, for the payment to their solicitor, Mr. *W. S. Allen*, out of the moneys standing to the credit of the Chief Registrar's Account, of the sum of £1432 9*s.* 11*d.*, in pursuance of an order of Mr. Commissioner *Sanders*, of the *Birmingham* Court of Bankruptcy.

By an order dated the 18th of November, 1864, the Commissioner directed criminal proceedings to be taken against the bankrupt for certain misdemeanors under the 221st section of the *Bankruptcy Act*, 1861. The assignees accordingly indicted the bankrupt at the Spring Assizes of 1865, at *Warwick*, for fraudulent concealment of his property, and he was convicted; but his sentence was deferred until certain points raised by counsel in his favour had been decided by the Court of Criminal Appeal. The

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conviction was affirmed; and at the Summer Assizes in the same year, the bankrupt was again tried and convicted on two indictments, jointly with two persons named *Goldston* and *Rosenberg*, for conspiracy to commit a misdemeanor in the same matter. He was sentenced on these convictions to twelve months' imprisonment. The costs of the prosecution were taxed by the Taxing Master of the Crown Office at £1517 9*s.* 5*d.*, of which the sum of £84 19*s.* 6*d.* was paid to the prosecutors out of the *Birmingham* Borough Fund, and the remainder was ordered by the Commissioner to be paid out of the "Chief Registrar's Account," under the provisions of the 223rd section of the *Bankruptcy Act*, 1861.

Payment out of this fund was, however, refused by the Accountant in Bankruptcy, on the ground that no notice of the taxation had been given to the Chief Registrar of Bankruptcy, and that in accordance with a verbal order given by the late Lord Chancellor, Lord *Westbury*, notice to the Chief Registrar was necessary. He insisted, therefore, on the bill being re-taxed in the presence of the Chief Registrar. No general order in bankruptcy had, however, been issued on the subject (1).

Mr. *W. S. Allen*, the solicitor of the assignees, was at first willing to submit to a re-taxation of his bill of costs, but on receiving an intimation from the Chief Registrar that an objection would be raised that the Commissioner had no power to direct any costs to be paid out of the Chief Registrar's Account, other than the costs incurred in the separate prosecution of the bankrupt, he withdrew his consent, and declined to attend the re-taxation until the point had been decided by the Lord Chancellor.

Mr. *Bacon*, Q.C., and Mr. *Bardswell*, appeared for the assignees. They referred to the 223rd section of the *Bankruptcy Act*, 1861 (2),

(1) This question is now set at rest by a General Order in bankruptcy, dated the 15th of April, 1867, whereby it is directed that seven days' notice of the taxation of such bill of costs shall be given to the Chief Registrar, or to a clerk at his office, by the attorney of the prosecutor, so that the Chief Registrar, if he thinks fit, may attend such taxation by himself or his attorney.

(2) This section is as follows:—

The Court may direct that the creditors' assignee, or if there be no creditors' assignee, the official assignee, or any of the creditors of the bankrupt, shall act as the prosecutor in respect of such offence, and shall give to such assignee or creditor a certificate of the Court having so directed, which certificate shall be deemed sufficient proof of

under which the prosecutions were undertaken, and contended that the object of the Legislature would be defeated if the accomplices in the fraud were not prosecuted as well as the bankrupt. If the costs in the present case were not paid out of the Chief Registrar's Account, they would fall on the bankrupt's estate or on the assignees personally.

The *Attorney-General* (Sir *John Rolt*), and Mr. *H. B. Miller*, for the Chief Registrar, submitted that it was the duty of the Chief Registrar to see that improper charges were not made upon the fund; and the assignees ought not to have attempted to carry through the taxation in his absence. With respect to the prosecutions, the object of the Act was answered when the bankrupt was convicted, and the assignees were not justified, either by the order of the Commissioners, or by public policy, in proceeding against the other two persons. It was not contemplated by the Legislature that the costs of the prosecution of any person, except the bankrupt, should come out of the Chief Registrar's Account.

LORD CHELMSFORD, L.C. :—

It is very desirable where frauds have been committed by the bankrupt alone, or by the bankrupt together with other persons, that both for the protection of that bankrupt's and all other bankrupts' estates, prosecutions should be instituted against those who have been guilty of the frauds; and, therefore, it would be unreasonable if the costs only of the prosecution of the bankrupt, and not the costs of prosecuting those persons who were concerned with him in the perpetration of the frauds should be allowed. In

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such prosecution having been directed as aforesaid; and upon the production of such certificate, the costs of such prosecution shall be allowed by the Court before which any person shall be prosecuted or tried in pursuance of such direction, unless such last-mentioned Court shall specially otherwise direct; and when allowed by any such Court, such sum so allowed shall be ordered by the said Court to be paid and borne in all respects in the same manner as the expenses of prosecutions for felonies are now paid and borne, and the same shall be paid and borne accordingly; and any expenses incurred by such prosecutor other than those so defrayed in accordance with the next following clause shall be paid out of the account intituled "The Chief Registrar's Account."

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the present case, there must be a re-taxation, and in such re-taxation the proper costs of all the prosecutions must be allowed. The costs of the re-taxation must also be allowed out of the Chief Registrar's Account. I cannot, however, allow the costs of this application against that fund.

Solicitors for the Assignees: Messrs. *Chilton, Burton, Yeates, & Hart,* agents for Mr. *W. S. Allen, Birmingham.*

Solicitors for the Chief Registrar: Messrs. *Aldridge, Bromley, & Thorn.*

MANCHESTER SCHOOL CASE.

L. JJ.
1867
April 25, 29; May 13.

Charity—Grammar School—Gratuitous Education—Mixture of Paying and Free Scholars—Competitive Examination.

A grammar school was founded in 1525, for the gratuitous education of boys without any distinction of class. In 1849, a scheme was settled, providing for the education of the scholars in classics and mathematics, and also in modern languages and physical science. The income of the school having become insufficient for carrying out the scheme, the Court (affirming *Wood*, V.C.) sanctioned the admission of 100 additional boys at an annual payment, which was to be applied to the augmentation of the general funds of the school.

But the Court (differing from *Wood*, V.C.) *held*, that all the scholars, whether paying or free, should be equally considered as on the foundation, and that no distinction should be made between them with respect to exhibitions and prizes; and also that there should be no competitive examination for the free scholars on their admission.

Observations on the benefits likely to arise from the mixture of free and paying scholars in the same school.

THIS was an appeal by the Attorney-General against an order made by Vice-Chancellor *Wood*, approving of a scheme for the future management of the *Manchester Free Grammar School* (1).

The management of the school has been repeatedly under the consideration of the Court (2), and the history of its foundation and the various alterations which have been made in its management are fully stated in the report of the hearing before the Vice-Chancellor, and in the judgment of Lord Justice *Turner*.

The scheme under which the school is at present governed was settled by the Vice-Chancellor Sir *L. Shadwell*, in 1849, but since that time the amount of the income of the school had considerably fallen off; and it was consequently found impossible to carry out the scheme of education in its integrity, particularly with respect to the proposed instructions in German, chemistry, and physical science.

Under these circumstances the trustees, with the consent of the Charity Commissioners, sought to obtain the sanction of the Court

(1) Reported Law. Rep. 1 Eq. 55.
(2) See *Attorney-General* v. *Earl of Stamford*, 1 Ph. 737, and 16 Sim. 453.

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to a variation in the scheme of 1849, so as to enable them to admit into the school, in addition to the present number of 250 free scholars, 100 boys on payment of a capitation fee of £12 12s., it being intended that the moneys to be derived from this source should be handed over to the common funds of the charity, and applied for the general purposes of the school.

The Vice-Chancellor acquiesced in the proposed alterations, and clauses were accordingly introduced into the scheme permitting the admission of a new class of boys on payment of an annual capitation fee of £12 12s., and also providing for competitive examinations on the admission of the foundation, or free, scholars. It was also provided that prizes and exhibitions to the universities should be given to the foundation boys out of the general funds, and to the non-foundation boys out of the surplus (if any) of the capitation fees.

To these proposed alterations the Attorney-General objected.

The *Attorney-General* (Sir *John Rolt*), and Mr. *Wickens*, in support of the appeal:—

Although the Court has power to alter schemes deliberately settled, yet this will not be done without weighty reasons: *Attorney-General* v. *Bishop of Worcester* (1). In the present case, the scheme of 1849 has not been in operation for a sufficient time to test its efficiency, and it is dangerous to make experimental changes in so important an institution as this. There is no absolute necessity that all the branches of education sanctioned by the scheme should be carried on immediately. The income will probably increase again, and, until it is sufficient to carry out the scheme fully, it will be better to keep to the proper objects of a grammar school, instead of altering the constitution of the school by admitting a new class of boys.

We object to the admission of paying boys for two reasons: first, because it is inconsistent with the intention of the founder, which was to provide for the gratuitous education of the boys of *Lancashire*; and secondly, because the mixture of rich and poor would introduce class distinctions among the boys, the evil tendency of which is pointed out in the *Bristol Grammar School*

(1) 9 Hare, 328, 361.

Case (1). If the Court should sanction the admission of paying boys, the two classes ought to be on an absolute equality with respect to prizes and exhibitions; whereas, it is proposed to keep up a distinction between foundationers and non-foundationers, which would operate injuriously to both classes.

We also object to the system of a competitive examination of the free boys on their admission. Some of the children admitted may be as young as five years of age, and none would have any chance of succeeding who had not the advantage of a careful home education. The children of the poor would be practically excluded.

Sir *Roundell Palmer*, Q.C., and Mr. *Little*, Q.C., for the trustees of the school:—

There is nothing inconsistent with the intentions of the founder in the proposed alterations in the scheme. On the contrary, they will enable the trustees to carry them out more fully. The object of the founder was to disseminate education as widely as possible among the inhabitants of the county, and especially of *Manchester*. It is proposed to accommodate 100 more scholars than would otherwise be possible. His object also was to provide gratuitous education for those who needed it; and by the proposed scheme the same number of free scholars will be educated as formerly, while their education will be more efficiently conducted, by reason of the funds derived from those who pay: *Berkhampstead School Case* (2). There is no indication in the foundation deed of any desire to confine the education to the poor; on the other hand, there are some rules and expressions which appear to contemplate the admixture of classes. Nor is it likely that this admixture will produce any evil effects; it is more likely to generate a kindly feeling between those who have been brought up at the same school.

With respect to the proposed examination of the free scholars on admission, it will be necessary to have some test, and that of a competitive examination answers better than any other in the long run.

Mr. *Wickens*, in reply.

(1) 28 Beav. 161; 6 Jur. N.S. 285. (2) Law Rep. 1 Eq. 102.

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May 13. SIR G. J. TURNER, L.J.:—

This is an appeal from an order of Vice-Chancellor Sir *W. Page Wood* approving a scheme for this charity. The charity was founded in the time of *Henry* VIII., and there were two deeds of foundation of that date. It is not necessary to state those deeds in detail; it is sufficient to say that they were executed for the purpose of founding a free grammar school at *Manchester*, that the income of the charity at the time was about £40 a year, and that there was to be a master of the school, and an usher to instruct "all children." A question was suggested, whether this was a charity for the rich and the poor, or for the poor only. So far as the deeds indicate, I think that the school was intended to be established by the founder for the benefit of all classes. The first of the deeds is, perhaps, somewhat equivocal, for in that deed the recital is, that the parties to the deed "had often taken into consideration that the youth, particularly in the county of *Lancaster*, had for a long time been in want of instruction, as well on account of the poverty of their parents, as for the want of some person to instruct them in learning and virtue; and to the intent that there should be some fit person to teach youths and boys freely, without anything to be given to or to be taken by him, had covenanted and agreed as thereinafter mentioned." So that the deed of foundation refers to the children having been in want of instruction, as well on account of the poverty of their parents as for the want of a proper person to instruct them. But any doubt there might have been upon this deed as to whether the school was intended solely for the poor, seems to me to have been very much removed by the second deed, dated the 1st of April, 1525, wherein it is recited that "the Right Rev. *Hugh Oldham*, Bishop of *Exeter*, considering that the bringing up of children in good learning and manners was the chief cause to advance knowledge, and that the liberal science or art of grammar was the ground and fountain of all the other liberal arts and sciences, and for the good mind which he had and bore to the county of *Lancaster*, where the learning of grammar had not been taught for lack of a sufficient schoolmaster and usher, had, at his great costs," and so on. So that all reference to the poverty of the children is omitted in that deed, and it is stated that the reason of the foundation

was because there had been a lack of "a sufficient schoolmaster and usher" to teach the children. Such being the nature of the foundation, so far as I think it necessary to state it, the course of education down to the year 1833 appears to have been this: Latin, Greek, and English were taught to the children free; but writing, arithmetic, and mathematics, though taught to the children, were paid for by them.

This being the state of things, the property of the charity had, in the year 1833, very greatly increased, and the trustees applied to the Court, under *Sir Samuel Romilly's Act*, for a scheme for the better administration of the charity; and that scheme was settled by the Master and approved by the Court. It is not necessary to enter into the details of this scheme, for in a few years it was superseded by another scheme, under the circumstances which I am about to mention. In the year 1835, an information was filed, complaining of the scheme of the year 1833. It was filed against the trustees of the charity, at the relation of the inhabitants of *Manchester*. The cause was first heard by Lord *Cottenham*, and afterwards on re-hearing by Lord *Lyndhurst* (1). Lord *Cottenham's* opinion was, that the boarders were not entitled to participate in the benefits of the charity. Lord *Lyndhurst*, upon the re-hearing, thought that some further inquiry was necessary before that point was decided, and he directed an inquiry accordingly. It is worthy of notice, that the question, whether there should, or should not, be boarders in the school, was not in any way in dispute in the case. The simple question was, whether the boarders should participate in the benefits belonging to the foundation. The result of Lord *Lyndhurst's* decree was a reference back to the Master, who then settled the scheme for the charity. The cause came before the Vice-Chancellor of *England*, Sir *Lancelot Shadwell*, upon the Master's report, and he approved the scheme settled by the Master, and this scheme, until the institution of the proceedings now brought before the Court, regulated the administration of this charity (2). However, between the year 1833 (when the first scheme was settled) and the year 1849, the income of the charity had greatly fallen off. This fact was brought to the attention of the Court by a Petition presented by the

(1) *Attorney-General* v. *Stamford*, 1 Ph. 737. (2) 16 Sim. 453.

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trustees to come on with the cause for further directions. Unfortunately, however, but little attention seems to have been paid to the matters alleged in that Petition. Possibly the parties relied upon the income of the charity again reaching its normal amount. The result of the decree made by the Vice-Chancellor was an approval of the scheme of 1849, and a declaration of the Court that there should be no boarders in the school. The scheme of 1849 was of this character: After declarations which prefaced the scheme and explained it, it provided, first, that a sufficient part of the school-house should be provided and appropriated for the use of the high master of the school and his assistants, and the usher and his assistants, and the scholars attending the school, and in which the learned languages should be taught gratuitously by the high master and usher and their two assistants: Secondly, there was a lower school to be provided, in which there was also to be a master, and that was to be appropriated to the gratuitous instruction of the scholars requiring such instruction, in the rudiments of the English language and classical literature, in writing, and in the fundamental rules of arithmetic: Thirdly, the trustees were to provide a writing-master to instruct all the scholars attending the school, except those in the lower school: Fourthly, the trustees were to appropriate or provide a room for affording gratuitous instruction in the higher branches of arithmetic and mathematics; and until the state of the trust funds should enable the trustees to appoint a person exclusively as a mathematical master, the instruction was to be afforded by such of the other masters, ushers, or assistants, as the Dean of *Manchester* and the high master for the time being should direct. Such appointment of mathematical master exclusively was to be made when the state of the funds would warrant the same, before any of the salaries of the other masters, as fixed by the 11th provision of the scheme, were increased; and the requisite power and authority were given to the trustees: Fifthly, the trustees were to provide another school-room for gratuitous instruction in general English literature; and for the purpose of affording instruction in the last-mentioned school-room, a proper and sufficient master or assistant, or proper and sufficient masters and assistants, was or were to be appointed: Sixthly, the feoffees were also to provide a

room for instruction in the French and German languages and literature, and such other modern languages and literature as the dean and the high master should from time to time think expedient: Seventhly, the feoffees were to appropriate or provide proper and sufficient accommodation or room for gratuitous instruction in the modern arts and sciences, or some of them, as the dean and high master should direct to be taught therein. Persons from time to time were to be engaged as lecturers or teachers, to deliver instruction in such arts and sciences, at such times and in such manner as the dean and high master should think expedient; and for the purpose of providing and paying for this instruction, and for procuring proper instruments and apparatus for the due illustration of lectures and other instruction to be given in such arts and sciences, the feoffees and trustees were every year to advance out of the surplus income from time to time in their hands, and which should then remain unappropriated, such yearly sum not exceeding £200, to be disposed of as might be recommended by the dean and high master. The whole of the rooms were to be as one connected establishment, called the *Free Grammar School;* and all boys of five years of age were to be eligible to become scholars of the school, and were to be allowed to continue until the age of twenty. Amongst other things, the 11th rule regulated the salaries to be paid to the different masters. There was an exclusion of boarders from the school. The times at which the instruction was to be given were to be regulated by the high master and the dean. All the scholars were to be entitled gratuitously to receive all or any part of the instruction given at the school. There were to be exhibitions from the school; and as to the exhibitions it was provided as follows: "That the exhibitions hereafter to be awarded by the feoffees and trustees of the said charity to such of the said scholars quitting the said school, and going to reside at either of the universities of *Oxford* or *Cambridge,* as shall be found duly qualified, shall be granted only out of, and that the number and value of such exhibitions shall depend on, the amount of the surplus funds of the said charity from time to time remaining at the disposal of the said feoffees and trustees, after providing for all the expenses attendant upon the execution of this scheme."

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To the outline of this scheme no objections have been made, but unfortunately the income of the charity has not been restored to its original amount, and it is insufficient to carry the scheme into effect. It is stated by the trustees, and established by the evidence, that some of the purposes of the scheme cannot be carried into effect in the present state of the income of the charity. Those purposes are,—the appointment of a master or masters of German and other modern foreign languages, French excepted; the appointment of lecturers or teachers of modern arts and sciences, and the provision of the necessary instruments and apparatus; the purchase of Greek and Latin lexicons, to be sold to the scholars at half price; the appointment of any further assistants or additional masters; the purchase of books for the use of scholars; the gift of premiums authorized by the scheme to be awarded by the examiners as special rewards; and the granting of exhibitions to scholars proceeding to the universities. Not one of these objects can be reached in the present state of the funds of the school.

Under these circumstances, the trustees have come to the Court for a new scheme, and the scheme brought under our consideration by this appeal has been settled by Vice-Chancellor *Wood*. The principal feature of the scheme is a proposal to introduce into the school 100 boys, who shall pay £12 12*s*. a year each for their education, and so supplement the funds of the charity by the addition of 1200 guineas a year, which, it is said, would enable all the purposes of the scheme of 1849 to be carried into effect. The school, it appears, could accommodate, or at least could be made to accommodate, 350 boys. It contains at present about 250. This scheme is objected to by the Attorney-General, who has brought the present appeal.

It was first argued for the appeal, that so short a time has elapsed since the settlement of the scheme of 1849, that that scheme ought not, at present, at least, to be disturbed, and what fell from me, as Vice-Chancellor, in the *Kidderminster School Case* (1), was relied on in support of this argument; but the scheme of 1849 has positively directed things to be done by the trustees which cannot be done in consequence of the income

(1) *Attorney-General* v. *Bishop of Worcester*; 9 Hare, 328, 361.

not being sufficient for the purpose. It has positively directed, amongst other things, the appointment of a master to teach German and other modern languages, besides French. It has positively directed the appointment of a master or lecturer in arts and sciences, and an allowance of a sum not exceeding £200 a year for illustrating the lectures. These purposes cannot, according to the present state of the funds, be carried into effect. Surely the trustees cannot be wrong in having come to the Court to explain the reasons which exist for the directions of the Court, given by the scheme of 1849, not being carried into effect, and to ask that other directions may be given which they may be able to carry into effect. I am of opinion that they were not only justified, but that it was their bounden duty to come to the Court to have proper alterations made in the scheme.

Another general objection which was made on the part of the Attorney-General requires more consideration. He objects to the introduction into the school of paying boys, and the objection is taken upon two grounds. First: it is said that it is an alteration in the constitution of the charity; that the charity would cease to be a free grammar school, at which all boys should be taught freely and gratuitously. Secondly: it is said that the introduction of paying scholars would be prejudicial to the free scholars, because it would introduce into the school two classes of boys,—one who would be paying for their education, and another who would be receiving their education freely, and this, it is contended, would be dangerous to the well-working of the charity. As to the first objection, namely, the alteration of the constitution of the charity, all boys whom the income of the charity is sufficient to educate according to the course of education already approved by the Court, are to continue to be educated freely; there is no alteration, therefore, in the constitution of the charity. Its whole income, so far as it will extend, is to be applied in giving free education. More boys cannot be educated freely, unless the extent of the education given at the school is reduced. You can only educate more boys freely by cutting off some of the education which is given, and some of the expenses which are incident to giving that enlarged education. Now, nobody has suggested, and I imagine nobody can think, that that can be for the benefit

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of the free scholars, who are to receive the extended education, and who, if the scheme now before the Court is adopted, will receive gratuitously the whole of that extended education. Therefore that part of the objection cannot be maintained.

Then as to the supposed prejudice by the introduction of paying scholars; without going the length of saying that there is in no case danger of prejudice in the education of different classes in the same school, this, at least, I think, may safely be said,—that if there is danger on one side, there is benefit on the other. The introduction of the higher class, so far as it may be considered as a higher class,—the paying class,—raises the character of the lower. The two classes become more intimately moulded together, and better feelings are generated in the higher class towards the lower. This is practically illustrated every day. How ready, on the one hand, are men who have succeeded in life to afford aid to their schoolfellows who have failed; and how often, on the other hand, do men who have failed point with pride and gratification to their schoolfellows who have been more successful than themselves! It cannot, therefore, be said that this introduction of the two classes is an unmixed evil. If there may be cases in which it would be an evil, there must be cases in which it would be productive of great and permanent good. It is in this point of view that this case must be looked at. And so looking at it, I feel no doubt of the expediency of the plan which is proposed for the introduction of a hundred boys being adopted. First, there is the position of *Manchester* to be considered, its population, and the character of that population. It is mainly composed of a working population. I believe the inhabitants number nearly half a million, and are composed principally of working classes of the community—men of various degrees of talent and of different habits, men of whom any one who has had experience among them can never speak in any other terms than those of the highest possible respect and regard, —men whose advantages and improvement in life every well-thinking man would be desirous in every respect to promote. Of course, the members of this class are men who receive very different amounts of remuneration, some of them occupying positions affording them large salaries, rising to the position of head men in establishments in which there may be hundreds under them.

These men are not remunerated upon the same scale as mere weekly workmen, but are men who receive considerable salaries, and they are men who must naturally feel great anxiety that their children should have the benefit of a good substantial education, which may promote their advancement in life; and I should be glad to ask the question, why are the children of these men to be excluded from the benefits of the school, as they are by reason of the funds being unequal to the numbers, and by reason of there not being a possibility of admitting more than 250 scholars to receive the education which is provided? Why should they be excluded from a school founded for the instruction of all classes? Again, look at the wants of the trade of *Manchester;* the demands which necessarily exist in a manufacturing town of so great an extent, and carrying on so large a trade, for clerks, for accountants, for managers. Is it not beneficial to all classes that the school should be open to the children of persons of that description who will succeed in the progress of life to the position of clerks and officers of the trading establishments of the town?

But what is more to the purpose, if more be wanted, is this. Look at the benefits which this scheme would afford to the scholars who do not pay. As I have said, if the income of the charity be not increased in the mode which is proposed, the necessary consequence will be that the education which is provided must be reduced; whereas, by the adoption of this scheme, free scholars will get for nothing the more extended education. It is hardly necessary to mention instances in which enormous benefits would be conferred upon the free scholars by this scheme. Take the case of German. The funds are not sufficient to enable a master to be appointed to teach the German language. Look at the trade going on between *Manchester* and *Germany;* look at the necessity of having clerks competent to carry on correspondence in the German language. Again, with reference to arts and sciences, take chemistry. Is there nothing in the dyeing process which goes on at *Manchester*, to the improvement of which a knowledge of chemical science is useful, if not necessary? Again, as to machinery. By far the greater number of improvements in machinery have, I believe, been originally devised by working men, who have seen where the failure is in a particular machine,

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and have devised some scheme for obviating that failure. Surely very great benefit would result by the persons employed in the manufactories being able to understand the working of machinery. If, therefore, there is any evil likely to accrue to this school by the introduction of these paying scholars, in my opinion the benefits which will result from their introduction will very far outweigh the evil.

I quite concur, therefore, in the general principle of the scheme. Some of the details, however, are objected to. First, it is said that the scheme has introduced competitive examination for the admission of boys into the school. It does, I confess, seem to me to be carrying the doctrine of competitive examination a little too far to render it dependent upon competitive examination what boys should be admitted into the school. Look at the ages of the boys. What value can there be in a competitive examination between boys five years old, to decide whether they should be admitted to the school? Again, as Mr. *Wickens* has very truly observed, the effect of introducing competitive examinations would be that the children who have been well educated at home, viz., children of a higher class, if there is to be a distinction of classes in the school, would succeed in obtaining admission, while the children of the lower class would be excluded. That would be a result very much to be regretted. Besides, this introduction of competitive examinations points, I think, a little too much to the supposition that schools of this description were instituted only for the education of the cleverest boys, and I do not take it that this was the intention of the founders of such institutions as these—that none but clever boys should receive the benefit of the education provided by them. On the contrary, I should rather say that the object of the founders of such schools as these was to give education to all boys who might be capable of receiving it, and not to the cleverest boys only. I think, therefore, that this direction of the scheme ought to be varied, and that it should be left to the trustees to determine what boys should be admitted to the school, having regard to the qualifications of the candidates, and the nature and character of the charity as a free school, and that this should be so both as to candidates for the first admission to the school, and as to those, if any, who, having been admitted as

paying scholars, desire to become non-paying scholars. Another objection which has been made on the part of the Attorney-General was to the mode in which the benefits of the school are divided; that, according to the scheme as proposed, benefits are to be given to the paying scholars out of the income of the contributions which they make, and to the non-paying scholars out of the charity, and I agree in that objection also. I think it very desirable that all the boys in the school should be on the same footing, and I am not disposed to agree to the words which are contained in the scheme of "foundation and non-foundation scholars." All the boys should, I think, be denominated foundation scholars. Paying scholars may be introduced, but when introduced they should be upon the foundation, so that all the boys may be on the same footing. It would tend very much to defeat the benefit which results in these schools from the moulding the two classes together that there should be classes differently named, and a barrier put between them, by saying that some part of the funds should go to one class and some part to the other.

These are the only objections that have been pointed at in the argument; but, in considering the case, some other points have occurred to me which I should wish to be carefully considered by the trustees before this scheme is finally settled. I think that, in order to make the scheme work, the trustees should consider and determine in what order the different alterations which are proposed to be made should be introduced. Otherwise I apprehend that the same unfortunate state of circumstances as exists now may recur. The funds may be sufficient for the promotion of some of the purposes of the scheme, but not sufficient for the promotion of all. Unless the trustees determine beforehand what is to be done if the funds should not be sufficient for the promotion of all the purposes of the scheme, they would get into the very same difficulty which has brought them here now, and it would be necessary to come to the Court again. I think the scheme should be moulded in this respect, so that the different purposes of the scheme should be introduced in regular succession, and in doing this, great attention should, I think, be given by the trustees to the question of the introduction of further masters. There are 200 boys in the upper school, and only six masters for

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the education of those boys, which gives thirty-three or thirty-four boys to each master. I have taken some pains to inquire into the proportion of masters to boys in well-conducted schools, and I find that it is one master to twenty boys. Perhaps, that might be going too far; and I would suggest one master to twenty-five boys. I would also suggest to the trustees whether the annual payment of the paying scholars should not be increased to 16 guineas a year, which I do not think would be objected to by men earning £200 or £300 a year, who are desirous of giving their children a good education. The additional amount thus realized would leave a margin for exhibitions and prizes. With regard to the age of admission, I think five too low; and I would suggest the discontinuance of the system of purchasing Greek lexicons and selling them to the boys at half price. Before sanctioning the school library, I should be glad to know its character and purpose, and whether it was part of the original foundation. I observe also that there is a provision that exhibitions should not be tenable with college scholarships. I doubt whether that is a prudent provision. I have known boys who, by means of such benefits, have maintained themselves at the university without any cost to their parents. The last suggestion I would make is, that a larger number of trustees than three should constitute a quorum. With these observations, I recommend the trustees to remodel the scheme, and the matter can again be mentioned to the Court.

LORD CAIRNS, L.J.:—

I entirely concur with the Lord Justice, both in the conclusions at which he has arrived, and the suggestions which he has made for the consideration of the Attorney-General and the trustees.

Solicitors for the Attorney-General: Messrs. *Raven & Bradley.*
Solicitors for the Trustees: Messrs. *N. C. & C. Milne.*

In re RICHMOND HILL HOTEL COMPANY.

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L. JJ.
1867
March 15, 16, 19, 20.

Company—Contributory—Agreement to take Shares and to set off Calls in payment for Goods.

In July, 1863, *E.* applied for 150 £10 shares in a company on the faith of an agreement with a promoter (subsequently ratified) that he should only pay 30*s.* per share in cash, and that the further calls should be set off against goods. *E.* paid a deposit of 10*s.* per share, and the shares were allotted to him in August, when he paid the further sum of 20*s.* per share. He received the certificates and was entered on the register. No goods were ordered, and the company having been ordered to be wound up:—

Held (reversing the decision of *Wood*, V.C.), that *E.* must be on the list of contributories.

Whether he could not sustain a claim against the company to be indemnified against the calls, under the collateral contract to take shares only in payment for goods supplied, *quære*.

THIS was an appeal from an order of Vice-Chancellor *Wood*, made in the winding up of the *Richmond Hill Hotel Company, Limited*, by which he had directed the name of Messrs. *Elkington* to be removed from the list of contributories, under the following circumstances.

The company was incorporated on the 13th of July, 1863, by registration of a memorandum of association, with a capital of £100,000, in 10,000 shares of £10 each, for the acquiring of ground on *Richmond Hill*, and the erection thereon of an hotel.

From the affidavit of Mr. *Alfred John Elkington* it appeared that in July, 1863, Mr. *J. C. Hodges*, the promoter of the company, called at the house of Messrs. *Elkington's* firm in *Moorgate Street*, and stated that he, on behalf of the company, was desirous of arranging for the firm to supply the electro-plate and cutlery required for the hotel, upon certain terms which he then proposed.

Messrs. *Elkington* acceded to their terms, and sent to the secretary of the proposed company the following letter, which was dated the 10th of July, 1863:—

"Sir,—We have considered the proposal made on behalf of your company to our representative, which we understand to be as

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follows:—That you undertake to give us the order for the electro-plated goods and cutlery that will be required for the use of your hotel, at our published prices, to the amount of £3000, provided we on our part agree to allow you 25 per cent. discount, and consent to take scrip for 150 shares in your company, and pay the deposit of 10*s.* per share on that number of shares; and we now write to signify our assent to this proposition, provided that such scrip be delivered to us at once, and be in no way different from your ordinary shares as sold in the market, being as readily negotiable: that we are not to incur any liability or be called upon to sign the company's deed or articles for association, or to pay any further calls beyond 10*s.* per share until all the goods which we hereby agree to furnish shall have been supplied, and until we shall have received full payment in cash for our account. If the order does not prove to amount to the sum specified above, a proportionate part of the sum deposited by us to be returned to us.

"*Elkington & Co.*"

On the following day, Messrs. *Elkington* sent in an application for shares in the usual form, and on the 14th of July they paid the deposit of 10*s.* per share.

On the 12th of July, Messrs. *Elkington* received from Mr. *Hodges* the following letter, which was dated the 11th of July, 1863.

"Gentlemen,—As promoter of the above company, I undertake to place in your hands the order for supplying the same with all the goods manufactured by you, and required by them, for said hotel, to be by you supplied at your wholesale list price, less the usual discount of 20 per cent., and I undertake to have this agreement confirmed at next board meeting, and entered upon the minutes of the company, a copy of which will be sent to you; and I further agree that you shall not be called upon for any money beyond the 10*s.* on application, and 30*s.* on allotment, on the 150 shares taken by you this day; but that any calls made shall be placed to your credit, as money due to you on goods manufactured, and to be delivered unto our gentlemen. "*J. C. Hodges.*

"Should your order for the board not amount to £3000, the proportionate reduction shall be made in your application for shares, and the amount returned to you. "*J. C. Hodges.*"

On the 13th of July, 1863, Messrs. *Elkington* wrote to Mr. *Hodges* a letter in the following terms:—"We are obliged by your letter of the 11th inst., but noticing that you have not attended to our condition, that we are not to be called upon to sign the articles of association of the *Richmond Hill Hotel Company*. When confirming the agreement at the next board meeting, please remember that this forms part of it, and should be certified to us accordingly. With this reservation, we are quite content with the arrangement, and are much obliged to you for your kind attention."

The company having been registered on the 13th, Messrs. *Elkington* received from Mr. *Hodges*, who had now become a director of the company, another letter, dated the 14th of July, 1863, as follows:—

"Gentlemen,—Your favour is to hand, and I will take care that your request shall form part of the minute of the board, on the confirmation by them of my contract with you, although I fancy you will see, when the time comes for signature, that it will be your interest to sign with others. In my own case, I should certainly sign; but as by this you will not be bound to do so, you can of course make it a matter for your own future consideration. I am happy to tell you all is progressing satisfactorily.

"*J. C. Hodges.*"

The letter of allotment of 150 shares to Messrs. *Elkington* was issued on the 1st of August.

On the 5th of November, Mr. *Hodges* wrote to Messrs. *Elkington*, asking for a copy of his agreement with them for the supply of the company with their manufactures, in order that he might get it confirmed by the board of directors.

On the 12th of November, a meeting of the directors of the new company was held, to which Messrs. *Elkington* were summoned by a letter from the secretary. The meeting was attended by one of their clerks, and a resolution was passed accepting the tender made by Messrs. *Elkington*, with the addition of a fresh stipulation, which was embodied in the following letter written at the time by Messrs. *Elkington's* clerk:—"We hereby undertake to supply your hotel with goods of our manufacture, viz., our best electro-plate, at a discount of 20 per cent. from our catalogue prices; and that if

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your order exceed £3000, we take a further amount of shares (in payment) in proportion to the first, viz., one-half.—Yours respectfully, &c., *Elkington & Co., T. K.*" No entry appeared on the minutes of any resolution confirming the special contract respecting the shares contained in the correspondence between Mr. *Hodges* and Messrs. *Elkington*.

On the 24th of November, Mr. *Elkington* paid a further sum of £225, being a payment of 30*s.* a share upon the 150 shares, and received the share certificates, and was entered on the register as a shareholder in respect of them.

Circulars of the company relative to meetings and calls had been, from time to time, forwarded to the firm, but they were never required to pay any money beyond the £300.

The winding-up order was made in 1866. No goods whatever had been supplied by Messrs. *Elkington* to the company.

Upon these facts the Vice-Chancellor held that the agreement to take the shares was conditional upon goods to the amount of £3000 being ordered from Messrs. *Elkington*, and directed their names to be removed from the list of the contributories (1). The official liquidator appealed from this decision.

(1) His Honour's judgment, delivered on the 20th of February, 1867, was as follows:—

The whole point in this summons turns upon the question whether Messrs. *Elkington* took these shares simply and unconditionally, or whether they took them subject to the proviso that the shares were not to be allotted unless goods were ordered by the company. That question must depend wholly upon the correspondence which took place between the parties. It has been insisted that *Hodges*, at the time of writing the first letter, was only a promoter of the company. But that circumstance is unimportant, because, when the company was formed, he subscribed, and became a director. I look at the correspondence, both before registration and afterwards, when the company adopted what had taken place, as parts of one and the same contract.

[His Honour read the correspondence set out above, noticing the stipulation made by the subscribers through misapprehension of the law (an error into which *Hodges* himself appeared to have fallen) that they were not to be called upon to sign the company's deed, which stipulation could not, consequently, be strictly performed; remarking, also, on the singularity of the arrangement mentioned in the postscript to *Hodges'* letter of the 11th of July, whereby, in case the order for goods should not amount to £3000, a proportionate reduction was to be made in the "application" for shares. His Honour continued:—]

From the expression in *Hodges'* letter of the 11th of July, "In my own case I should certainly sign, but as by this

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Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the official liquidator:—

The contract between Messrs. *Elkington* and *Hodges* did not bind the company, which was not at that time in existence. It was never confirmed by the company, and would only make *Hodges* liable to damages: *Kelner* v. *Baxter* (1).

But if the agreement with *Hodges* was confirmed by the company, the transaction amounted to an absolute contract on the part

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you will not be bound to do so"—clearly shews that up to this date neither one party nor the other considered themselves bound. What, in other words, these gentlemen wished to say was: "We don't wish you to be bound hand and foot in our company, unless your shares are met by our orders." That is clear from the stipulation, that if the order did not come up to £3000, a reduction was to be made in the number of shares. Then nothing happens till the 5th of November, when *Hodges* writes a letter, which is followed by a letter from the secretary which is not in itself an adoption of the contract, but a request that Messrs. *Elkington* should attend at a board meeting on the next day. Accordingly, Messrs. *Elkington's* clerk attends the meeting, and there writes the letter of the 12th of November, containing the expression, "If your order exceeds £3000, we take a further amount of shares in payment." Those words *in payment*, are very important; they convey the meaning that "we will not have shares, except in the way of payment for goods." To that the company say, "If we take more goods, you must take a further amount of our shares in payment." Then a resolution is passed that "the tender" be accepted. What is the tender? It can be only this: "I tender you my goods at such and such a price, less such and such discount, offering to take your shares in payment." After that came the payment, on the 24th of November, of Messrs. *Elkington's* allotment money on the 150 shares, and that, no doubt, is the most difficult part of their case. Thereby they made themselves shareholders; but I think they did so on the faith of the contract, thereby bringing the case within the authority of the decision in *Bunn's Case*. The goods were to be paid for in shares: if there were fewer goods, there would be a less number of shares; if more goods, then more shares. Chattels were to be given in exchange for shares. If, therefore, Messrs. *Elkington* had brought their goods, and had said: "Here are our goods, enter us as holders of so many shares," they would have been bound; but as no goods were ever delivered or ordered, the effect is the same as if their names had never been placed on the list of members at all. The case, therefore, is brought to this: that no contract to take shares was ever made between the parties. The arrangement was shortly this: "No goods, no shares." Therefore I strike Messrs. *Elkington's* name off the list of contributories and the register of members. Their costs, and the costs of the official liquidator, will come out of the estate.

(1) Law Rep. 2 C. P. 174, 12 Jur. N.S. 1016

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of Messrs. *Elkington* to take the shares, with a collateral contract with the company to indemnify them against calls, which might give a right of action against the company. But this collateral contract could not affect the rights of creditors. Messrs. *Elkington's* application for shares, and the allotment, were unconditional. They paid the deposit, and were entered as shareholders on the register. They have ever since kept the certificates, and allowed their names to remain on the register as shareholders, and they cannot now escape from their liability to creditors: *Woollaston's Case* (1); *Felgate's Case* (2); *Ex parte Morgan* (3); *In re Anglesea Colliery Company* (4); *Nickoll's Case* (5); *Chapman & Barker's Case* (6); *Shackleford's Case* (7) is distinguishable. There the contract to take the shares was conditional on the face of it, and no allotment was made, and the deposit was returned. In *Wood's Case* (8) there was no acceptance of the shares.

A contract with a shareholder that he shall not be liable to pay calls is *ultrà vires* and void: *Bunn's Case* (9).

Mr. *De Gex*, Q.C., and Mr. *Caldecott*, for Messrs. *Elkington*:—

The whole of the contract must be taken together. If the agreement with *Hodges* was never confirmed, or if there was an illegal stipulation in the contract, then the whole transaction falls to the ground, and Messrs. *Elkington* are not shareholders: *Bunn's Case*; *Wing* v. *Harvey* (10).

The mention of scrip in Messrs. *Elkington's* first letter was a misconception of the present law as to joint stock companies. What they meant was, that the firm were to have ordinary negotiable shares. We contend that the contract to take shares was conditional, and that the number of shares was to be proportioned to the amount of goods ordered. The deposit was paid in anticipation of goods being ordered to an amount sufficient to cover the shares. The entry in the register ought to have shewn that the shares were allotted conditionally, according to the true meaning

(1) 4 De G. & J. 437, 5 Jan 1858
(2) 2 D. J. & S. 456.
(3) 1 Mac. & G. 225.
(4) Law Rep. 1 Ch. 555, 12 Jan 1866
(5) 24 Beav. 639.
(6) Law Rep. 3 Eq. 361.
(7) Ibid. 1 Ch. 567, 12 Jan 1866
(8) 3 De G. & J. 85.
(9) 2 D. F. & J. 275, 6 Jan
(10) 5 D. M. & G. 265, 16 Jan 394

of the contract. *Shackleford's Case* (1); *Woodfall's Case* (2); and *Wood's Case* (3) are authorities in our favour.

The time which has elapsed is no bar. Messrs. *Elkington* did not know how their names were entered on the register; and there can be no acquiescence where there is no knowledge.

Mr. *Karslake*, Q.C., in reply.

SIR G. J. TURNER, L.J.:—

This case is said, and perhaps accurately, to be an entirely new case; and certainly I do not mean to say that it is a case altogether free from difficulty.

The question arises between the *Richmond Hill Hotel Company* and Messrs. *Elkington*, who are large manufacturers of plated goods; and it originated in a letter which Messrs. *Elkington* wrote (they having antecedently had some communication with the company, or rather with the promoter of the company, for at this time the company was not incorporated) upon the subject of supplying the company with articles of their manufacture. On the 10th of July, 1863, the firm wrote to the promoter of the company, Mr. *Hodges*, in these terms:—[His Lordship read the letter.] How the case would have stood if it had rested on that letter, and upon a simple acceptance of the terms contained in it, it is not, in my opinion, necessary for us to say. The case was put in argument that Messrs. *Elkington* were stipulating for scrip, and for scrip only; that there was an entire misunderstanding both on the one side and on the other; that a dealing was contemplated in something which did not exist in that form at the time the letter was written; and that the whole matter was altogether a mistake in referring to scrip. But I think it would be very difficult so to construe the letter, because, although scrip is mentioned in the introductory part of it—"we consent to take scrip for 150 shares"—the term "scrip" is afterwards interpreted the by proviso contained in the letter: "provided that such scrip be delivered to us at once, and be in no way different from your ordinary shares as sold in the market, being as readily negotiable."

(1) Law Rep. 1 Ch. 567; 12 Jur. N.S. 695 (2) 3 De G. & Sm. 63.
(3) 3 De G. & J. 85.

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Although, therefore, the term "scrip" is introduced into the letter, scrip appears to have been understood by Messrs. *Elkington*, the writers of this letter, as meaning the ordinary shares of the company, as sold in the market. And certainly if it was necessary for us to rely, or to give any opinion, upon the meaning of this word "scrip," I should, as I have said, feel great difficulty in supposing that Messrs. *Elkington*, on the one side, or the promoter on the other, could be considered, or could have meant, to be dealing with what was formerly designated "scrip," but which at the time of this correspondence had ceased to exist, and had been abolished by the Legislature. The proposal, however, made by Messrs. *Elkington* was not contained in that letter alone, for at the same time when that letter was written there was an application made by Messrs. *Elkington* for shares in the company (a very clear indication of what they understood to be meant by the word "scrip"), and that application was in these terms. [His Lordship read the letter of application.] Here, therefore, is another term in the proposal made by Messrs. *Elkington*, the letter and the application for shares being contemporaneous; and in the result, the proposal on the part of Messrs. *Elkington* is to take 150 negotiable shares, but not to incur any liability, or to be liable to pay any calls upon those shares. How was that proposal dealt with on the part of the promoter? By a letter of the 11th of July, 1863, in answer to the letter of the 10th, he writes to Messrs. *Elkington* in these terms:—[His Lordship read the letter and postscript.] It is clear, therefore, that the promoter, when he answered that letter, treated the application by Messrs. *Elkington* as an application for shares; he speaks of it in those terms in his letter, and he alters the terms of Messrs. *Elkington's* proposal by introducing £20 per cent. instead of £25 per cent., and by making provision that Messrs. *Elkington* are to pay upon their shares £1 10*s.* on allotment, and he speaks of those shares as "taken by Messrs. *Elkington* this day."

Now it is suggested that the postscript contained in this letter renders the whole contract between Messrs. *Elkington* and the company a contingent contract; that there was to be no contract, except in the event of the order being given by the company to Messrs. *Elkington* for the delivery of the manufactured articles,

and that, I understand, is the view which the Vice-Chancellor has adopted in this transaction. I cannot agree in that view, because if this postscript had been intended to render the contract entirely contingent, I cannot understand why the application for shares was sent in by Messrs. *Elkington* with their letter of the 10th of July. It seems to me that their applying for the 150 shares in the terms expressed in the letter of application, is quite inconsistent with the notion that it could be intended by the parties that the contract should be wholly contingent upon whether goods should be ordered or not.

Not being able to put that construction upon the postscript contained in the letter, the question then arises what construction is to be put upon it? and it seems to me, both from the language of the postscript itself, and from the facts of the case, that the true construction of the postscript is this, that if the amount of goods which should be ordered by the company from Messrs. *Elkington*, should not come up to £3000, then a reduction should be made in the shares which had been taken by Messrs. *Elkington*, and a return made to them of the amount which had been paid by them. That seems to me to be the result of the contract.

Matters stood thus at the time of the incorporation of the company. The company was incorporated on the 13th of July, and, immediately following the incorporation and the letter of the 11th of July, there comes a letter of the 13th of July, 1863, which has been found since the case was first opened before us, from Messrs. *Elkington* to the promoter, who had then become secretary of the company, which is in these terms. [His Lordship read the letter.] Here, therefore, it is to be observed, that Messrs. *Elkington* treat the contract as a contract one of the conditions of which is that they are not to be called upon to sign the articles of association, and that there is to be a confirmation by the board of the contract, and that this is to be certified to them. In answer to that letter, on the 14th of July, 1863, the promoter writes in these terms. [His Lordship read the letter.] During all this time the application for shares by Messrs. *Elkington* was pending, and this letter does not in any way repudiate that application, or displace that term of the proposal that was made by Messrs. *Elkington* to the board. All that they say is, we are not

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to be called upon to sign the articles of association (in fact, nobody does sign), and we are not to be liable for calls upon the shares. There is nothing to indicate, either in the letter written by Messrs. *Elkington* on the 13th, or in the answer sent by the promoter on the 14th, that Messrs. *Elkington*, if an allotment should be made to them in pursuance of their application, are not to stand in the position of shareholders of the company.

Then comes the allotment on the 1st of August. The whole 150 shares are then allotted to Messrs. *Elkington*, and they pay £225, being £1 10*s.* upon 150 shares. Whether they could, or could not, at that stage, have said, "We will not take these shares at all—you are not carrying out the contract with us," is one question. It is not the question we are to decide here. They actually accepted the shares, accepted the allotment, and paid the amount which was to be paid upon the allotment. Thereupon they stood as complete shareholders of the company upon the allotment which was made to them. They were registered as shareholders in the company, and so stood, from that time down to the time when their names were taken off by the Vice-Chancellor.

Nothing further passed, except what occurred in the month of November. In that month Mr. *Hodges*, the secretary, wrote to Messrs. *Elkington* for a copy of the agreement with them, and, on the 11th of November, he summoned Messrs. *Elkington* to a meeting of the company on the following day, and they attended, by their clerk. Upon that occasion the clerk, on the part of Messrs. *Elkington*, writes this letter:—[His Lordship read the letter.] There is no alteration here in the position of Messrs. *Elkington* as shareholders of the company; on the contrary, there is an agreement on their part to take further shares, if the order to be given by the company to them for their goods should exceed £3000. It does not seem to me, therefore, that any arrangement which had been made by Messrs. *Elkington* with the company, before this month of November, is in any way altered by what then passed. Even supposing there was a *locus pœnitentiæ*, at that moment, on the part of Messrs. *Elkington*, what did they do afterwards? They actually took away the certificates of these shares, and they have these certificates in their possession at the present

time. They have had the opportunity of dealing with the shares, —for their original proposal, it is to be observed, stipulated that they should be negotiable shares,—they have had the opportunity of dealing with those shares from the time they were allotted to them down to the present time. If dividends had been paid upon the shares, they would have had the right to receive those dividends. Then the question is, whether this Court is now to let them off, and remove them from the list of contributories, because of the contract, and of the terms contained in their proposal, and adopted on the part of the company, that they were not to be called upon to pay calls on their shares. I do not think that any such contract as that could be carried into effect. There may be rights on the part of Messrs. *Elkington* as against the company, or as against individual members of the company, who may have contracted with them, either to be indemnified in respect of the calls, or to have the shares taken up by the company; but until they work out those rights they cannot, I think—their names being upon the register, and they having accepted the shares, and having had them allotted to them—insist that they are not shareholders in the company.

With great respect therefore, to the Vice-Chancellor, I think the order ought to be discharged, and that Messrs. *Elkington* must be restored to their position upon the list of contributories.

LORD CAIRNS, L.J. :—

I regret in this case that I am unable to come to the same conclusion as the Vice-Chancellor, because I cannot avoid thinking that if Messrs. *Elkington* had been clearly aware of the consequences of what they were doing, they would have entered into their contract with this company in a different manner. But what we have to deal with are the acts and conduct of Messrs. *Elkington*, and not the question whether they themselves were aware of what the legal consequences of those acts were. Now, in one point of view, this case seems to me to be a very clear and simple one. On the 11th of July, Messrs. *Elkington* signed an application for 150 shares in the company in the printed form, and by that application they undertook to pay 30*s.* upon allotment on each share, and calls when made, and to sign the articles of asso-

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ciation when required to do so. That was sent in by Messrs. *Elkington*, in form to the company, but in reality to the promoter of the company, because the company itself was not incorporated until two days afterwards. The reply to that application came to them on the 1st of August, in the same year, 1863. That was after the incorporation of the company, and it was in the usual form of a letter of allotment, allotting to them the whole 150 shares, and referring, upon the face of it, to their letter of application of the 11th of July. It is a distinct and categorical answer to a distinct and categorical request, complying exactly with the request in its terms. Then, that letter of allotment having come to them on the 1st of August, 1863, the next date for this purpose to which I refer is the 24th of November. Upon that day they acted upon the letter of allotment, they paid the 30s. additional upon each share, and they received the share certificates; and the form of the share certificates is this—each certifies that Messrs. *Elkington* are the proprietors of so many shares of certain numbers, with £2 paid, subject to the rules and regulations of the company; and these certificates Messrs. *Elkington* received and accepted, and retained in their possession. They are put upon the register of the company, and they are so returned in the various returns which were made subsequently. They state further that they received various circulars from time to time, and a notice of a call, and then Mr. *Elkington*, who makes an affidavit, states also that "these shares were taken by my firm on the distinct understanding that until goods to the amount of £3000 had been actually taken and paid for by the company, no further call beyond £2 was to be paid on the shares."

Now it seemed to me, throughout the argument, that the real point for determination in this case might be said to be this, did Messrs. *Elkington* intend and agree to become members and shareholders *in præsenti*, with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did Messrs. *Elkington* agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders? To these questions a sufficient and conclusive answer to my mind would be given by the facts, which, up to this time, I have

referred to. It appears to me that it would be impossible to do otherwise than answer the first of these questions in the affirmative, namely, that Messrs. *Elkington*, whatever may have been the collateral agreement as to the effect of their becoming shareholders, did agree to become members and shareholders *in præsenti*. It appears to me it would be impossible to hold by any construction of the collateral letters, that persons who distinctly apply for shares, pay their deposit upon the application, receive the letter of allotment, pay the further sums due upon the letter of allotment, receive the share certificates, possess and retain those share certificates, and are returned upon the register in the usual returns made to the Joint Stock Companies Register Office—that they can say afterwards, whatever may have been the collateral agreement, that they were not, and did not intend to become, shareholders *in præsenti*. They were perfectly *domini* of the shares; they might have sold them in the market; they might have received profit, if profit there were upon them, and no person could, I apprehend, have controlled their right to exercise in that way dominion over the shares.

Now what is the collateral agreement, or what is the qualification sought to be imported into this absolute document which I have referred to? I do not propose to go through the letters at length, but merely to indicate the view I take of them. Contemporaneously, or almost so, with the application for shares was the letter of the 10th of July: probably it was written the day before the application for the shares, for that is dated the 11th. It is quite true, that that letter of the 10th of July spoke of not incurring liability, or signing, until goods were supplied. At the same time, that very same letter stipulates that the scrip which was to be issued for the 150 shares should be "in no way different from your ordinary shares, as sold in the market, and as readily negotiable," shewing that although there was a desire that there should be no legal liability, there was also a desire coexisting that they should be masters of the shares, for the purpose of selling and negotiating them in the usual way. But even if there were not, it is a letter accompanying the absolute application for shares, which I have referred to, which agrees to pay calls, and to sign the articles of association. It would be

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impossible to say the meaning was that the application for shares was to be deferred—held in suspense—and was not an application to receive, in the shape of allotment, an immediate answer, if the company were so minded.

Then comes the letter of the 11th of July from the promoter, varying some of the terms: the only part to which I refer for this purpose is the sentence in the middle. The promoter, in answering the terms which were proposed, refers to "the 150 shares taken by you to-day"—expressions which seem to me to be quite inconsistent with any idea but of their being shareholders *in præsenti*. Not only that, but the promoter says he undertakes that Messrs. *Elkington* shall not be called upon to pay more than 10*s*. and 30*s*. on the 150 shares taken: shewing that there was to be a liability upon those shares, not merely in respect of the 10*s*. already paid, but a further liability to pay, at all events, 30*s*. more, which 30*s*. could only be paid upon the footing of the allotment and the receipt of shares. Now it is very true that to that letter there is a postscript, which says that in the event of goods less than £3000 being wanted, a proportionate reduction shall be made upon the application for shares. That, I apprehend, must be construed, even if this letter were the only document between the parties, as meaning nothing more than this:—You take 150 shares; they are to be allotted to you; you are to pay a sum upon allotment. If hereafter it shall turn out that less goods are supplied, there shall be a reduction in your favour, which could only be by the company taking off the hands of Messrs. *Elkington* the surplus shares which they had over and above the amount to be set against the goods supplied, which, I need not say, would not be an undoing the position of Messrs. *Elkington* as shareholders *ab initio*, but would be a taking off of their hands shares which, up to that time, they were possessors of.

I have referred to this letter of the 11th of July, and I have referred to it upon the assumption—which, perhaps, is too favourable for Messrs. *Elkington*—that this letter was ever distinctly before the company after its incorporation. At the time it was written it certainly could not have been before the company, or received their confirmation, because the company was not incorporated until one or two days afterwards.

Then come the letters of the 13th and the 14th of July, which I think also are of importance to be observed upon. The letter of the 13th is from Messrs. *Elkington*, reminding the promoter that he had taken no notice of the clause in their letter, that they were not to be called upon to sign the articles of association of the *Richmond Hotel Company*. Messrs. *Elkington* had said: "Please remember that this forms part of our agreement, and should be certified to us accordingly." To that the promoter says: "Your favour is to hand, and I will take care that your request shall form part of the minute of the board on the confirmation by them of my contract with you;" and then he goes on at the same time to reason with them, and says that if he were in their place he would have no difficulty about signing, and he says: "You can make it a matter for your future consideration." Now, I refer to those letters, because they shew that at that time Messrs. *Elkington* seemed to think that they were to have the contract immediately submitted to the company, and that they were to have (whatever might be its value is another matter) a distinct statement, in the form of a resolution of the company, that they were not to be called upon to sign, as they called it, the articles of association. But what happened afterwards? There was no such application made at any board meeting, no resolution passed, no such certification of the resolution to them that they were not to be liable upon the articles of association, and the letter of allotment was sent to them without any of these preliminaries having taken place which the letters of the 13th and 14th of July contemplate.

Now, I am not prepared at all to say that it would not have been perfectly competent for Messrs. *Elkington*, on receiving the letter of allotment, to have returned it to the company, and to have said, "There is a complete misunderstanding in sending us this letter of allotment; referring to the correspondence that has passed between your promoter and ourselves, you will find that, although we went through the form of applying for shares, the whole of that was subject to the understanding, that either you should give us a resolution of the company that we were to be under no liability upon these shares, or that we should have a right of refusing to take shares upon which we were to be liable." They did nothing of the kind. They received the letter of allotment, they kept it, and

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there then come the proceedings in the month of November. Those proceedings originated in Mr. *Hodges* writing to Messrs. *Elkington* for a copy of their agreement with them. What was sent we do not know; whether it was one, two, or three, or the whole of the four letters. On the 11th of November, 1863, the secretary of the company writes back to Messrs. *Elkington*, saying "they"—that is, the company—"have considered your letter in reference to supplying the *Richmond Hotel*," which would mean, certainly, that they had only one letter before them. Then comes the board meeting on the 12th of November, 1863, and the resolution upon the minutes is, "That the tender of Messrs. *Elkington* had been considered," which again would appear rather to infer that one document only had been before the board. But I do not dwell upon that. The result is, that a further letter was written on that day at the board by the agent of Messrs. *Elkington*, agreeing to take more shares, if more than £3000 worth of goods were ordered, and nothing whatever was said by way of qualification of the effect which I am bound to attribute to the allotment of shares that had then taken place; no further agreement was come to, altering in any way whatever the legal position of Messrs. *Elkington* at the time of the allotment of the shares. I have said already, that at the time of the allotment of the shares no collateral agreement had been made by the company, or had been confirmed by the company, and therefore I am bound to take that allotment of shares as having put Messrs. *Elkington* in the absolute position of shareholders. Then, subsequently to the meeting of November, they receive and take away the certificate of shares, to which I have already referred.

Therefore, of the two questions which seem to me to represent the two alternative views of the case, I am bound to answer in the affirmative the one which suggests that Messrs. *Elkington* intended to be shareholders *in præsenti*. If that is so, that is enough for the present application. It is quite obvious that hereafter another and a very different question may arise in the case of Messrs. *Elkington*, to which a more favourable answer may be given for them, but that is not before us for the present. It is quite clear that a question may arise hereafter—Messrs. *Elkington* having become shareholders *in præsenti*, if there was

a collateral agreement (and I am bound to say, I think there are very strong reasons for contending that there was), that in some way or other the payment of calls upon the shares should be connected with the supply of goods—whether as regards the company (I do not speak of the creditors of the company) that does not give Messrs. *Elkington* a right to say, that as no goods have been supplied, if they are called upon to make a contribution in respect of these shares for the creditors of the company, they must in turn be indemnified by the company itself for that contribution. That is a controversy not for to-day, but for some other time. That will depend, of course, upon whether this collateral agreement was in point of fact made, and whether it was *ultrà vires* or *intrà vires* of the directors. That will be a subject for future consideration. At present all that we can do, I am afraid, is to say that Messrs. *Elkington* were rightly put on the list, and that they must for the present remain there. I think, with my learned brother, that there should be no costs as regards Messrs. *Elkington*, either in the Court below, or here. The official liquidator will take his costs out of the estate.

Solicitor for the Official Liquidator: Mr. *F. W. Dolman.*

Solicitors for Messrs. *Elkington*: Messrs. *Austen, De Gex, & Harding.*

In re RICHMOND HILL HOTEL COMPANY.

PELLATT'S CASE.

Company—Contributory—Agreement to take Shares, and to set off Calls in Payment for Goods.

In July, 1863, *P.* applied for fifty £10 shares in a company on the faith of an agreement with a director that he should receive orders for goods to the extent of at least £1000; that he should only pay 30s. per share in cash, and that the calls for the rest should be set off against the goods. He paid, on application, a deposit of 10s. per share. The agreement was, with an additional term, ratified by the board of directors in November, 1863. In December, 1863, *P.* wrote to the company, declining to proceed further in the matter. In July, 1864, the secretary wrote to *P.*, requiring him to pay £3 10s. per share for calls. No letter of allotment had ever been sent to *P.*,

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but he had been put on the register. In November, 1866, an order was made for winding up the company:—

Held (affirming the decision of *Wood*, V.C.), that *P.* was not a contributory, for that he had only agreed to take shares upon the conditions of the special agreement as to set-off, which, if *ultrà vires* of the directors, was not binding on the company, and therefore, for want of mutuality, not binding on *P.*; and, if *intrà vires*, was still not enforceable against *P.*, because the stipulations on the part of the company had become incapable of being performed.

An agreement that the calls payable by a tradesman who is a shareholder in a company shall not be payable in cash, but only by set-off against goods supplied by him, is in general *ultrà vires*.

Per Lord *Cairns*, L.J.:—Where a person applies for shares in a company, there is in general no binding contract to take shares until the company have communicated to him an allotment of shares; the decision in *Bloxam's Case* (1), being referable to its special circumstances.

THIS was a motion of the official liquidator, by way of appeal from a decision of Vice-Chancellor *Wood*, who had held Mr. *Pellatt* not liable to be on the list of contributories.

The *Richmond Hill Hotel Company, Limited*, was registered on the 13th of July, 1863. Shortly before its registration an interview took place between Mr. *Hodges*, the promoter, and Mr. *Pellatt*, who carries on business under the firm of "*Pellatt & Co.*," as a dealer in glass and china, and terms were verbally arranged between them for Mr. *Pellatt's* supplying the hotel with glass and china, to the extent of at least £1000, taking fifty shares of £10 each, and paying only 10*s.* per share on application, and 30*s.* per share on allotment, all further calls to be set off against the goods supplied.

On the 14th of July, 1863, Mr. *Hodges*, who had become one of the directors, wrote to Mr. *Pellatt* as follows:—

"Referring to my interview with one of your firm, in reference to this hotel, I beg to undertake, on behalf of the directors, to place in your hands the supply of the glass, china, &c., or, in fact, all such goods as are manufactured by you and required by the hotel, provided that you at once take and pay deposit on fifty shares in the undertaking; and further undertake that you shall not be called upon to pay any money beyond the 10*s.* on application, and 30*s.* on allotment; but all calls that may be made in respect of your fifty shares shall be placed to your credit as

(1) 33 Beav. 529; 12 W. R. 995,

payment on account of goods' manufacturing; and that on your producing to me bankers' receipt for the deposit, this agreement shall be made a minute of the first board, and a copy of such minute forwarded to you."

On the 20th of July, 1863, Mr. *Pellatt* sent in the usual formal letter of application for fifty shares, engaging to take the same, or any less amount that might be allotted to him. He at the same time paid the deposit of 10*s.* per share.

Nothing further was done in the matter till the 5th of November, 1863, when *Hodges* wrote to Mr. *Pellatt* as follows:—

"Please send me first thing to-morrow morning copy of agreement made on account of *Richmond Hill Hotel Company*, for the supply of your manufactures to that company, that I may have the same confirmed by board meeting to-morrow, and resolution of such confirmation forwarded to you, as I do not find the copy I took at the time."

Mr. *Pellatt* forthwith sent a copy, and on the 12th of November, 1863, attended a board meeting, when the terms of the arrangement were discussed, and he left with the directors the following letter, addressed to the directors, and signed by him "*Pellatt & Co.*":—

"In reference to the proposal made, that we should upon taking fifty shares in your undertaking have the preference for the supply of glass, china, earthenware, and chandeliers, to the amount of £1000, we engage to supply the same at catalogue prices, less a discount of £20 per cent., and generally upon the best terms at which you can be supplied for cash."

The directors passed a resolution accepting the tender in the last-mentioned letter, and a copy was sent to Mr. *Pellatt*.

On the 21st of December, 1863, Mr. *Pellatt* wrote as follows to the secretary:—

"We fear you may think us very changeable, but, from reasons entirely personal to ourselves, we are not disposed to carry out the arrangement proposed. We desire to thank your directors for the preference they were desirous of shewing us, and trust that should

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they find a respectable house (which we do not for a moment doubt) to take our place, that they will kindly return us our deposit."

Nothing further passed between Mr. *Pellatt* and the company till the 25th of July, 1864, when the secretary wrote to him as follows:—

"I am desired by the directors to inform you that they have not as yet found any one in your place as regards the glass contract, and I am therefore to request that you will pay into the *London and County Bank, Hanover Square Branch*, the sum of £175, due from you to the company for calls made on your shares, on or before Saturday next, the 30th instant, in order to prevent the matter being placed in the hands of the solicitors to the company."

Mr. *Pellatt* took no notice of this letter, and nothing further passed. He had never received any letter of allotment, nor paid anything beyond the 10*s.* per share, and no goods ever were ordered from him. He had, however, been placed on the register of shareholders.

An order was made on the 3rd of November, 1866, for winding up the company, and on the 18th of February, 1867, Vice-Chancellor *Wood* decided that Mr. *Pellatt's* name ought not to be on the list of contributories.

Mr. *Karslake*, Q.C., and Mr. *W. W. Karslake*, for the official liquidator:—

This was an unconditional contract to take shares, with a collateral contract by the directors, the breach of which does not make the applicant cease to be a shareholder. In *Shackleford's Case* (1) the offer to take shares was conditional on the face of it. Here there was a simple application for shares in the common form. A formal allotment, with notice of it to the allottee, is not necessary: *Cookney's Case* (2); *Bloxam's Case* (3).

[The LORD JUSTICE LORD CAIRNS:—*Bloxam's Case* was rather special. There had been a conversation, in which *Bloxam* was in-

(1) Law Rep. 1 Ch. 567. (2) 3 De G. & J. 170.
(3) 33 Beav. 529; 12 W. R. 995.

formed that if he did not receive an answer within a certain time he was to consider his application granted. But in the ordinary case, where a person applies for the maximum number of shares, undertaking to accept them, or any less number, and the company is under no obligation to give him any, is not a reply to the application necessary?]

We submit that when the facts in *Bloxam's Case* (1) are examined, the decision shews that an answer is not necessary. The present case is very similar to *Yelland's Case* (2), and *Elkington's Case* (3). The letter of July, 1864, requiring payment of £3 10*s.* per share, was full notice to *Pellatt* that he was on the register, and any right he may then have had to have his name removed is lost by delay.

Mr. *Roxburgh*, Q.C., and Mr. *Locock Webb*, for Mr. *Pellatt*, were not called upon.

SIR G. J. TURNER, L.J.:—

This is, in effect, an application by the official liquidator to put Mr. *Pellatt* on the list of contributories of this company, in respect of fifty shares, for which Vice-Chancellor *Wood* has held him not to be liable. It has been argued for the Appellant that, independently of all other considerations, Mr. *Pellatt* ought to be put upon the list on the simple ground that, on the 20th of July, 1863, he applied for fifty shares, and that fifty shares were, it is said, allotted to him in pursuance of this application, and his name placed on the register accordingly. But, looking to the nature of Mr. *Pellatt's* application, which was substantially an application to rectify the register, the mere facts that he applied for shares, and was put on the register, cannot be considered a sufficient reason for keeping his name on the list of contributories: and we must enter into the circumstances, and consider whether the company was justified in putting him on the register. If *Pellatt* unconditionally applied for shares, and the company allotted them to him, no doubt his name was rightly placed on the register. But if it turns out that there was an agreement which led to *Pellatt's* application for

(1) 33 Beav. 529; 12 W. R. 995. (2) 5 De G. & Sm. 395.
(3) *Ante*, p. 511.

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shares, that the application was founded on that agreement, and that for any reason that agreement is not binding on *Pellatt*, the fact of his name being on the register cannot alter his position.

The facts are these:—Shortly before the 13th of July, 1863, a meeting took place between *Pellatt*, and *Hodges*, the promoter of the company, and a negotiation ensued as to *Pellatt* supplying the company with the articles which formed the subject of his trade. The result of this negotiation was embodied in a letter written by *Hodges* to *Pellatt* on the 14th of July, 1863. [His Lordship read the letter.] The agreement here pointed at clearly had two parts; the company were to take goods from *Pellatt & Co.*, and *Pellatt & Co.* were to take shares. This agreement was never carried out: it was to be made a minute of the first board of directors, and a copy was to be sent to *Pellatt*. It does not appear that it ever was made a minute of the board, and no copy of such minute was ever sent to *Pellatt*. At this stage, therefore, there was no concluded agreement between *Pellatt* and the directors by which *Pellatt* was bound. Here the matter rests till November, 1863. On the 5th of that month *Hodges*, who seems to have had a peculiar faculty of losing important documents, wrote to *Pellatt* for a copy of the letter, that he might have it confirmed by the board. This clearly shews that up to that time it never had been confirmed by them. A copy was sent, and the directors required fresh terms to be introduced, providing for a discount of £20 per cent. being allowed. *Pellatt* had an interview with the directors, and signed the letter of the 12th of November, 1863. The case cannot be put more favourably to the company than by treating the letter of the 12th of November as importing into the letter of the 14th of July the terms as to discount and price. Reading the two letters together we have this agreement:—the company are to take goods from *Pellatt*, on *Pellatt's* taking the shares, upon the terms that orders for goods shall be given out of the price of which the calls are to be paid. On this two questions arise: (1), was it within the powers of the directors to enter into such an agreement with *Pellatt* so as to bind the company? and (2), if it was, what was the result of the stipulations on the part of the company becoming incapable of being performed?

On the first question, I do not mean to go the length of saying

that in no case, and under no circumstances, can the directors enter into a contract with a tradesman, who undertakes to supply goods to the company, that the price of the goods shall be set off against the calls upon shares taken by him. Possibly such a contract may, in some cases, be capable of being entered into. But in ordinary cases such a contract would, in my opinion, be *ultrà vires*, because it alters the tradesman's position as a shareholder from his position as defined by the *Companies Act*. If he should fail in the performance of his part of the contract, and neither supply goods nor pay calls, the company would have no remedy against him but by action for breach of contract, whereas, by the Act of Parliament, the liability to pay calls is a specialty debt, and the company has the usual remedies of a specialty creditor. I do not think that it is within the powers of directors to alter the position of a shareholder in this way, and on this ground, apart from other considerations tending the same way, I think this agreement not binding on the company, and if the company is not bound, *Pellatt* cannot be bound.

Again, supposing the agreement to have been originally valid, the company, at the time when we are asked to put *Pellatt* on the list, is in such a condition that its part of the contract cannot be performed. There cannot now be any orders for goods; and these orders furnished the motive for taking the shares. To say that *Pellatt* is to be bound by that part of the agreement which is against him, when that part which is in his favour has not been, and cannot be, performed, is preposterous.

It was urged that there had been such delay, that *Pellatt* ought not to be relieved to the prejudice of creditors; and, in support of that view, reliance was placed upon the letter of the 25th of July, 1864, demanding payment of £175, which was more than the 30*s*. per share which *Pellatt* was liable under the terms of his agreement to pay; and this, it was said, gave him notice that he was on the register for the fifty shares. But the mere fact of a demand being made, by the secretary of the company, for the amount of a call on the shares, cannot, as I conceive, be notice to the person on whom the demand is made that he is on the register, and certainly it cannot be held to be notice of the particular mode in which he was put on it. The company might be entitled (I do not

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say they were) to put this gentleman on the register conditionally, and he can only have contemplated being on the register subject to the condition. But what makes the case more clear, *Pellatt* had, long before July, 1864, repudiated the shares. [His Lordship read the letter of the 21st of December, 1863.] The first part of the letter appears to me to be a plain repudiation of the shares, and the latter part does not seem to me to alter its effect.

On these grounds, I think that the decision of the Vice-Chancellor was right. *Elkington's* case stood on a very different footing. There, independently of the letters between the parties, there was a distinct allotment to *Elkington & Co.*, a receipt by them of the shares allotted, and, if I recollect rightly, an application by them for the share certificates.

LORD CAIRNS, L.J.:—

I am of the same opinion. The circumstances are somewhat similar to those of *Elkington's Case*, but there are material differences between them. In *Elkington's Case* the Court considered that there were two agreements: the first constituted by an actual application for and allotment of shares, followed by acceptance of them, by which agreement Messrs. *Elkington* were made shareholders; and a collateral agreement, which might, or might not, be valid, as to setting off the price of goods supplied against calls.

In the present case we may put out of view everything that took place after December, 1863; for if there was then any *locus pœnitentiæ* to Mr. *Pellatt*, it appears to me that his letter of the 21st terminated the relations between him and the company. There are two important periods to be looked at, from the 14th of July to the 12th of November, 1863, and from the 12th of November to the 21st of December, in the same year. We first have the letter of the 14th of July, written immediately after the registration of the company by Mr. *Hodges*, who had been the promoter, and was now one of the directors. He writes as an individual director, stating, on the face of his letter, that it was to be confirmed by the board, and shewing that he had no authority to enter into a contract binding the company. Following on this, we have, on the 20th of July, 1863, a formal letter from Mr. *Pellatt*, for fifty shares, promising to take them, or any less number that might be allotted

to him. Now, I think that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract. *Bloxam's* case appears to have turned on special circumstances, creating a previous obligation to give him the shares if he applied for them. I cannot, therefore, consider an application for shares, followed by a registration not communicated to Mr. *Pellatt*, to constitute a completed transaction. We thus arrive at the conclusion that, up to the 12th of November, there was no binding contract. On the 12th of November a board meeting was held, for the purpose of having submitted to it, among other things, the confirmation of the letter of the 14th of July, a copy of which had been obtained and laid before the board. Looking at all the circumstances, I am of opinion that what was done on the 12th of November was a ratification by the board of the letter of the 14th of July, subject to variations introduced by Mr. *Pellatt's* letter of the 12th of November. Here, then, for the first time, we find a contract. There was then pending an application by Mr. *Pellatt* for shares; and what took place on the 12th of November was an agreement between the company and Mr. *Pellatt* that he should receive fifty shares on the terms of the letters. The first question, then, is, was not this contract *ultrà vires*, and, if *intrà vires*, is it a contract capable, in the circumstances which have arisen, of being performed? Without laying down any general rule, but looking only to the particular circumstances of this case, I entertain a strong opinion that the contract was *ultrà vires*. The intention of the Act is, that shares shall be held as shares wholly or in part paid up, or not paid up at all, and that, so far as they are not paid up, the ordinary liability to pay up the remainder in cash, when required, should attach on the holder of them; and it is required to be entered on the register how much has been paid up upon them. If some consideration is given, it may be quite right for the directors to state, on the register, that they are to be treated as in part paid up, though no money has passed; but I do not think it within their powers to contract that the calls, in respect of what remains to be paid up, shall be set off against goods to be supplied by the shareholder, and shall not be paid in money. The inconvenience arising from such a con-

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tract might be almost incalculable. Goods might not be supplied at all, or they might be supplied of such a quality that they ought to be rejected, and the remedies against the shareholder might be unavailable, while the other shareholders had all along been paying in cash. If the agreement was *ultrà vires* of the directors, then, since it must be taken as a whole, the question falls to the ground, and the directors have no right to hold Mr. *Pellatt* to be a shareholder.

If the agreement be valid, the next question is, whether it is one which can be enforced. It is one entire agreement, and, if enforceable, it must be enforceable as a whole. But how can Mr. *Pellatt* get the consideration for which he bargained? If he keeps the shares, no goods can now be supplied, and he must pay calls in money. In either view of the case, whether the contract be valid or invalid, I cannot hold that Mr. *Pellatt* is liable to be on the list; and the circumstance that he is on the register is material only in this respect, that it makes it necessary for the Court to rectify the register. The appeal will be dismissed, with costs.

Solicitors for Mr. *Pellatt:* Messrs. *Mancell & West.*
Solicitor for the Official Liquidator: Mr. *F. W. Dolman.*

L. JJ. 1867 *Feb.* 26, 29.

In re MADRID BANK.

WILKINSON'S CASE.

Contributory—Variance between Prospectus and Memorandum—Time.

9 H.L. 338, 352. 4 Eq. 595. 3 H. & M. 350

Where there is a material variance between the prospectus of a company issued before registration, and the memorandum of association, a person who has applied for shares on the faith of the prospectus, will have a reasonable time allowed within which to examine the memorandum, and repudiate the shares:—

But *Held* (affirming the decision of the Master of the Rolls), that where a shareholder had not examined the memorandum for more than eighteen months, and had taken no steps to repudiate the shares for some time after that, his name should not be taken off the list of contributories.

THE question in this case was, whether a shareholder ought to be placed on the list of contributories to the *Madrid Bank, Limited*

he having taken shares on the faith of the prospectus, and there being a material variance between the prospectus and the memorandum and articles of association.

The prospectus was issued on the 1st of May, 1863, and stated that there was to be an establishment of this bank at *Madrid*, with branches in the provinces, under the direction of the chief office in *London*, and that the bank would carry on the usual legitimate business of banking; and the prospectus set out the names of several Spanish noblemen as forming the council of administration in *Madrid*.

By the memorandum of association, which was dated the 13th of May, 1863, the objects of the company were said to be the transacting of every kind of banking business in *London*, and at other places in the *United Kingdom*, and in *Spain* and its colonies and elsewhere, including therein, amongst other things, the advancing and lending of money on the deposit of title deeds, goods, wares, and merchandise. And by the articles of association of the same date, it was provided that the principal banking house of the company should be at such place as the directors might, from time to time, determine.

Mr. *Wilkinson*, on the 13th of May, signed and filled up the form of application attached to the prospectus, and sent it to the directors, in the following terms:

"To the Directors of the *Madrid Bank, Limited.*

"Gentlemen,—Having paid to the *Alliance Bank of London and Liverpool, Limited*, the sum of £20, being a deposit of £1 per share on twenty shares in the above company, I hereby request that you will allot me that number, which I agree to accept, or any less number you may allot me, and to pay the balance of deposit and calls thereon, and I also authorize you to enter my name in respect thereof on the register of members of the company, and I agree to sign the articles of association when required to do so."

On the 30th of June, twenty shares were allotted to him, and he paid a further sum of £20 upon them on the 13th of July. On the 14th of August, 1863, he paid a call of £3 on each share. On the 20th of November, 1864, notice was given of a meeting, which was held on the 17th of December, to consider the propriety of

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winding up the company, at which meeting Mr. *Wilkinson* attended. Another meeting was held on the 19th of January, 1865, at which he was also present, and finally, on the 18th of March, 1865, an order was made for winding up the company, and the official liquidator having applied to have Mr. *Wilkinson's* name placed on the list of contributories, the matter was adjourned from the Chambers of the Master of the Rolls into Court.

Mr. *Wilkinson*, in an affidavit, deposed that about the 1st of May, 1863, when he applied for the shares, he saw a prospectus of the company, but he had not seen the memorandum or articles of association, and assumed that they would be in accordance therewith. That he had never seen them until after notice had been given of the meeting to wind up the company. That he had since seen them, and that he should not have applied for any shares in the company if he had been aware of the variances between the prospectus and the memorandum and articles, and that he applied on the faith that the usual banking business would be carried on, and that the chief office would be in *London*. In March, 1865, he learnt, for the first time, that four of the directors had received £500 each out of the promotion money, and that the bank had never been brought into operation in *Spain*. Since these facts had come to his knowledge, he had not sought to derive any benefit from the bank, but had continuously repudiated the shares pretended to be allotted to him; and he stated that he was induced to apply for the shares on the representations contained in the prospectus.

The Master of the Rolls, under these circumstances, placed Mr. *Wilkinson's* name on the list of contributories (1).

(1) Jan. 29, 1867. The Master of the Rolls said he was quite clear that, according to the principles on which he had always proceeded, it was impossible for him to take this name off the list of contributories, but, at the same time, his Lordship was exceedingly embarrassed by the decisions of the Lords Justices, and would be very glad if the case was taken to them by way of appeal, so as to have this matter finally determined. He had always thought that it was the duty of a person who entered into a contract of this description, to know the terms to which he became subject. If a person signed a contract upon the footing of the contents of another document, he was bound by the contents of that other document, whether he liked to see it or not. There was also this obvious result, that otherwise no one would ever look at a memorandum or articles of association. Any solicitor or counsel would advise

Mr. *Wilkinson* appealed.

Mr. *Baggallay*, Q.C., and Mr. *Druce*, Q.C., in support of the appeal:—

There is a substantial variance between the prospectus and the memorandum and articles. If a contributory has been led to believe that the contents of a document are something different from what they really are, he will be relieved from the consequences of having become subject to it. This case is not so strong as *Ship's Case* (1); *Stewart's Case* (2); *Webster's Case* (3). Moreover, it is clear that no concession had been granted by the Spanish government, and, until it had, there could be no such council as that mentioned in the prospectus.

There is no question of creditors in this case, as there is far more than enough to pay them in the official liquidators' hands.

Mr. *Selwyn*, Q.C., and Mr. *Roxburgh*, Q.C., for the official liquidators, were not called upon.

SIR G. J. TURNER, L.J.:—

Each of these questions must depend upon the circumstances of the case. This gentleman applied for twenty shares, and paid £1 per share upon application. On the 30th of June the shares were allotted, and on the 13th of July he paid a further sum of £1 per share. A call was then made of £3, and that he paid on the 14th of August.

Now, I do not mean to say that, upon clear evidence of his having been deceived, the mere fact of his having paid calls would

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him on no account to look at them, because if the company turned out prosperously he would get the benefit, but if it turned out ill, and there was any variance, he would get off the list of contributories. The unfortunate creditors, who had advanced their money upon the faith of all these persons being shareholders, would find that, in consequence of something which was very like a juggle, there were no contributories left. That could not be the law, and was certainly not according to the ordinary principles of equity. It was the duty of a person entering into such a contract, within a reasonable time to go and see what the memorandum and articles of association were by which he was bound.

(1) 2 D. J. & S. 544, 11 Jur. N.S. 331.
(2) Law Rep. 1 Ch. 574, 12 Jur. N.S. 755.
(3) Ibid. 2 Eq. 741.

L. JJ. 1867 ~~ WILKINSON'S CASE.

of necessity bind him to be a shareholder in the company, but, at all events, it throws upon him the onus of proving, to the satisfaction of the Court, that he did not know of the variance between the prospectus and the articles of association. In every case of this description, if a man comes to be relieved upon the ground of this variance, this Court must of necessity expect from him a clear statement that he was not aware of that variance. But all that he has sworn is, that he did not see the memorandum or articles of association until after notice of the meeting to consider the winding-up had been given. He has not pledged himself to the fact that he did not know of that variance, or intimated in any way that he continued in ignorance of it until November, 1864; and, giving full weight to the arguments founded on the company not having been formed in accordance with the terms of the prospectus, and on the applicant not having interfered since he became aware of the variance, still, the interval from May, 1863, to November, 1864, is wholly unaccounted for by him. Under these circumstances, the Court would be going further than it has gone in any case, if it relieved him upon such evidence. It appears to me that this order of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

LORD CAIRNS, L.J.:—

The Appellant in this case desires to be absolved from contribution, on the ground that there are certain mis-statements in the prospectus.

His position is this: he applied for shares in the company, and authorized his name to be entered on the register, and agreed to sign the articles of association when required.

I must say, that, in my opinion, where a man agrees to take shares, and to be bound by the memorandum and the articles, he must be affected with notice of their contents, unless, at all events, within a reasonable time during which he can acquire knowledge of the contents, he repudiates the shares. In the case before us, where, in fact, the memorandum was not in existence when the prospectus was issued and the shares might have been applied for, there must necessarily be a time during which the applicant may go and consult the memorandum and articles when

they have come into existence, and may consider whether there is any ground for repudiating the shares.

What length of time will be necessary in each case will depend in some degree upon the circumstances, but there cannot be more than a reasonable time for making the discovery. Looking at the dates in this case, we are relieved from all difficulty, and we are also relieved from all argument as to the amount of variance. It was not until after the compulsory order for winding-up that any attempt was made by the Appellant to repudiate his shares. My opinion is, that the time which had thus elapsed was much more than was necessary for the Appellant to make himself aware of the contents of these documents. And when we look at the words of his affidavit, all we find is, that he did not see the memorandum until after the 20th of November, when he received notice of the winding-up meeting, and, therefore, it is quite consistent with his affidavit to suppose that he knew, although he did not see, the contents of the memorandum before the 20th of November. Under these circumstances, if he would be entitled to be relieved by shewing that he was ignorant of the contents, his case fails, as he cannot depose to that fact.

Upon these two grounds, that the lapse of time was utterly unreasonable, and that he does not deny his knowledge, my opinion is, that the order of the Master of the Rolls is correct, and that the appeal must be dismissed with costs.

Solicitor for the Appellant: Mr. *J. Pedley.*

Solicitors for the Official Manager: Messrs. *Treherne & Wolferstan.*

L. C.
1867
June 13, 14.

WEBSTER *v.* COOK.

Sale of Reversion—Life Estate—Charges—Excessive Rate of Interest—Penalty.

W. was entitled to the income of property subject to the payment of a life annuity to *C.*, and of the interest on mortgages, whereby the present income was reduced to a small amount. In consideration of the advance of £1000, *W.* assigned the income by way of security for the payment of £3300 on the death of *C.*, redeemable on payment of £1500 at the end of the first year. By a memorandum, *W.* further agreed to repay £400, and interest at 5 per cent. per month, which security was to be tacked to the former security:—

Held, that *W.*'s interest in the income was not a reversion, and that the transaction therefore could not be set aside as a sale at an undervalue:

Held, also, that the security for £400 and interest was valid.

Decree of the Master of the Rolls reversed.

THE bill in this case was filed by Sir *Augustus F. G. D. Webster* against *Robert Cook*, and stated that the Plaintiff was entitled to a life estate in certain moneys and funds, the produce of the sale of certain real estates, subject to a jointure rent-charge of £1000 a year, payable to Dame *Charlotte Webster* for her life, and to a jointure rent-charge of £500 a year, payable to Dame *Sarah Joanna Webster* for her life, and also subject to a mortgage for £23,000, and to covenants for payment of premiums on policies of insurance: that by an indenture dated the 17th of August, 1864, and made between the Plaintiff of the one part, and the Defendant of the other part, in consideration of £1000 then advanced by the Defendant to the Plaintiff, the Plaintiff covenanted for payment to the Defendant within three months after the death of Dame *Charlotte Webster*, of the sum of £3300, and, in the meantime, of interest after the rate of 1 per cent. per annum until her death, and after her death at the rate of 10 per cent. per annum until the sum was paid; and the Plaintiff further covenanted to insure his life for £3500, and to pay the premiums on the sums so insured: and the Plaintiff further assigned his life interest (subject as aforesaid) to the Defendant on trust to secure the payment of the £3300 and interest, as aforesaid, and of the premiums on the policies: and the indenture contained a proviso that in case the Plaintiff should pay to the Defendant the sum of £1500 on the

17th day of August, 1865, and all interest and premiums up to that day, or the sum of £1850 on the 17th day of August, 1866, and all interest and premiums up to that day, then the Defendant would accept the same in full discharge of the £3300 and interest: that, on the 5th of January, 1865, the Plaintiff signed a memorandum, by which he agreed that a debt of £400 due from him, with interest thereon at 5 per cent. per month, should be tacked to the security of the said indenture of the 17th day of August, 1864: that the income to which the Plaintiff was entitled in possession, after deducting the charges aforesaid, when he executed the mortgage was £215 a year, or thereabouts: that he had no professional advice or assistance in his negotiations with the Defendant for these loans: that he was at the time under great pressure, and in urgent distress for want of money: that on the 1st of July, 1865, his solicitors wrote to the Defendant to offer to redeem on payment of the sums actually advanced to the Plaintiff, and interest at 5 per cent., to which letter no answer was sent: and the bill prayed that on payment to the Defendant of such sums as the Court should consider him entitled to for principal and interest, the Defendant might be decreed to re-assign to the Plaintiff the life estate and premises comprised in the said indenture and memorandum, and to deliver up the indenture and memorandum, and all other securities, if any, to be cancelled. The Defendant, by his answer, said that he did not know the amount of the incumbrances on the Plaintiff's estate, or the ages of the ladies entitled to the jointures, and that the Plaintiff represented his income as £1500 a year: that the Defendant's purchase was at any time liable to be foreclosed, and liable to suits in Chancery, and that the Plaintiff knew he could not obtain better terms elsewhere. The Plaintiff made an affidavit echoing the bill, and filed affidavits to shew that the value of a reversion of £3300 on the death of Dame *Charlotte Webster*, was upwards of £2000. It further appeared that the Plaintiff was forty-seven years of age, and had had previous dealings with the Defendant, who carried on the business of a money-lender. The Defendant only entered into formal evidence, and offered at the bar to accept the £1500, and premiums, and interest, and costs, in discharge of the security.

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The suit came to a hearing before the Master of the Rolls, who made a decree for redemption of the mortgage on payment to the Defendant of the principal sum advanced by him, with interest at 5 per cent. from the date of the advance (1).

The Defendant appealed.

Mr. *Jessel*, Q.C., and Mr. *Horsey*, in support of the appeal:—

This bill merely asks for redemption, and the evidence attempts to raise an issue whether the transaction was not a sale of a reversion at an undervalue. It is not a reversionary interest at all; if it was held to be so, the life estate of nearly every nobleman in the kingdom must be held to be a reversion, as there are always

(1) Dec. 6, 1866. LORD ROMILLY, M.R., said, that this was a bill filed to set aside the sale of a reversion on the ground of inadequacy of value. He could not doubt that the price given by the Defendant for the £3300 payable on the death of *Charlotte* Lady *Webster* was grossly inadequate. The Defendant's case was, that the rule did not apply where the person selling the reversion was tenant for life in possession. But the cases of *Davis* v. *Marlborough* (2 Sw. 108), and *Portmore* v. *Taylor* (4 Sim. 182), were conclusive against this: indeed, the case of *Portmore* v. *Taylor* appeared to be undistinguishable in principle from this case. Whether the Court of Chancery had acted wisely in setting aside the sales of reversions when made for inadequate sums, might be questionable; and it might well be doubted whether it could be beneficial to the owner of the reversion himself, as the obvious effect of it was, by increasing the risk of the purchaser, to lower the price of the article. But it was too late to speculate on this point: the Court had determined that in all these cases the purchaser must prove that he gave full value for a reversion, and that, if he failed in doing so, the transaction could not stand. His Lordship was obliged to follow the rule, and as he was clear that he must hold this to be the sale, *pro tanto*, of a reversion on the death of Lady *Webster*, at an inadequate value, he was of opinion that the mortgage, and assignment made to secure it, must be cancelled, and the property reconveyed on payment of the principal sum advanced, together with interest at 5 per cent. per annum from the date of the advance.

As to the memorandum which related to the £400, the Plaintiff could not have any relief: it was not mixed up with the other transaction in any manner, except that the cancelled security was made a security for the amount. Of what value the memorandum would be to the Defendant, when the deed of the 17th of August, 1864, was cancelled, and the hereditaments and premises reconveyed, it was not necessary then to consider; but no facts were proved in the case which would enable the Court to deprive the Defendant of any advantage to which he might be entitled in respect of it. There would, therefore, be nothing in the decree with respect to the memorandum. With respect to the costs of the suit, none ought to be given.

life annuities charged on the estate. It is true that, on the death of certain persons, Sir *A. Webster's* income will be increased, but so it would be if he paid off the mortgages. He had an income, and you cannot divide the property and say that part is in possession and part in reversion: *Earl of Chesterfield* v. *Janssen* (1). In *Davis* v. *Duke of Marlborough* (2), and *Earl of Portmore* v. *Taylor* (3), which were relied upon by the other side, the estate in possession was very small, and the sale was substantially of a reversion. The Plaintiff is entitled to a decree for redemption on the terms of the deed, and to nothing more.

Mr. *Southgate*, Q.C., and Mr. *Dalton*, for the Plaintiff:—

The decree is good as far as it goes, but the Plaintiff ought also to be allowed to redeem the other security on payment of £400 at 5 per cent. per annum. The Plaintiff need not aver that the sale was at an undervalue, and the onus is on the Defendant to shew that he gave full value. The law as to sales of reversions is not altered by the repeal of the usury laws: *Tottenham* v. *Emmet* (4); *Croft* v. *Graham* (5). Unless you are dealing for an estate in possession, you cannot exact an unreasonable price, and it makes no difference whether the transaction is in form a sale or a mortgage. Moreover, the conditions of it are in the nature of a penalty.

Mr. *Jessel*, in reply.

LORD CHELMSFORD, L.C.:—

It is difficult to collect from the statements in the bill the exact grounds upon which the Plaintiff claims to set aside the securities given by him for the moneys advanced by the Defendant.

There is no statement of any fraud or over-reaching on the part of the Defendant, although it is probably meant to be insinuated by some of the paragraphs of the bill.

There certainly is no allegation, either in the bill or in the Plaintiff's affidavit in support of it, that the parties were dealing

(1) 1 Wh. & T. L. C. 483 (3rd Ed.).
(2) 2 Sw. 108.
(3) 4 Sim. 182.
(4) 14 W. R. 3; 10 Jur. N.S. 1090
(5) 2 D. J. & S. 155.

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for a reversion belonging to the Plaintiff, and that it was bought at an undervalue by the Defendant; and yet this appears to have been the ground upon which the Master of the Rolls decided the case. His Lordship, in commencing his judgment, stated the question in these terms: "This is a bill filed by Sir *Augustus Webster*, to set aside a sale of a reversion by him to the Defendant, on the ground of inadequacy of value." If it had been a case of this description, I should have no difficulty in determining that there is sufficient evidence adduced by the Plaintiff of the inadequacy of price, and the onus would have been upon the Defendant to prove that the transaction was reasonable.

But I am at a loss to discover what reversion there was in the Plaintiff, for which the parties can be said to have dealt. The policy of the law, which throws its protection round all reversioners, may be questionable, and has been questioned, and the principle ought not to be extended by analogy.

The supposed reversionary interest of the Plaintiff, which the Defendant is said to have purchased at an undervalue, is made out in this manner:—The Plaintiff was entitled to a life estate in moneys and funds which had arisen from the sale of certain settled estates. This life estate was subject to jointure rent-charges of £1000 to Dame *Charlotte Webster*, and £500 to Dame *Sarah Joanna Webster*, and also to mortgages to the amount of £23,000. By the indenture of the 17th of August, 1864, the Defendant agreed to advance and lend to the Plaintiff £1000, for which the Plaintiff agreed to pay the Defendant £3300 within three months after the death of Dame *Charlotte Webster*, and until her decease interest at 1 per cent. per annum, and after her decease at 10 per cent.

It was argued that this transaction was the sale of a reversionary interest to which the Plaintiff would become entitled upon the death of Dame *Charlotte Webster*.

I confess myself unable to comprehend the nature of the alleged reversion. The real interest of the Plaintiff was that of a life estate in possession in the moneys and funds, subject to rent-charges and mortgages, which nearly absorbed the whole of the interest. The death of Dame *Charlotte* will not occasion the falling in of a reversion, but will merely release the Plaintiff's

life estate from a charge of £1000 per annum, and occasion an addition to the surplus after satisfying the remaining charges to that extent. The case cannot, in my judgment, be treated as the purchase of a reversion, and the decree which proceeded upon that ground cannot be supported.

But the Plaintiff's bill is properly framed to enable him to obtain relief in another manner. By the indenture of the 17th of August, 1864, it was agreed between the parties that the purchase might be redeemed on payment of £1500 and interest on the 17th of August, 1865, or on payment of £1850 and interest on the 17th of August, 1866. The Plaintiff's bill was filed on the 25th of July, 1865, before the first period for redemption had arrived. It occurred to me in the course of the argument, and I threw it out for consideration, whether, as at the time of the filing of the bill the interest of the Defendant was redeemable, he could be entitled to more than the money actually advanced and interest, and whether the additional £500 must not be regarded as a penalty with which, in the case of a mortgage, the right of redemption cannot be fettered; but I am satisfied that that doctrine is inapplicable to the present case. It was, in my opinion, competent to the Defendant to purchase the sum of £3300 to be paid upon a future event, and to stipulate that if a smaller sum were paid before that event happened, he would receive it in satisfaction. The Plaintiff, therefore, seeking relief from the indenture of the 17th of August, 1864, can only have it upon the terms of paying the £1500 and interest.

But the Plaintiff also prays by his bill to have the memorandum of the 5th of January, 1865, delivered up to be cancelled. Now, the Master of the Rolls, dealing with the case as the sale of a reversion, was right in refusing to order anything with respect to this memorandum, which had no connection with the original transaction, and could not, in any manner, be affected by it. But the right of the Plaintiff to relief being a right, not to set aside the securities, but to have the benefit of the redemption provided for in the original deed, the Plaintiff cannot, in my opinion, be admitted to redeem without including the £400 the subject of the memorandum of the 5th of January, 1865. By that memorandum the Plaintiff agreed that this sum of £400, with interest thereon at

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the rate of £5 per cent. per month, should be tacked to his mortgage dated the 17th of August, 1864, thus agreeing not to redeem the one without the other. The Defendant is, therefore, entitled to insist upon this agreement being performed. The interest exacted by the Defendant is certainly of an excessive kind, and is calculated to create a prejudice against him. But the Plaintiff is not a young man, and is fully capable of taking care of himself; he knew that the Defendant was a money-lender, and he himself states that he had had dealings with the Defendant for four years previously, and if the Plaintiff chooses to enter into an agreement of this kind, in which he can impute no fraud or unfair dealing, I do not see what right equity can have to interfere with the transaction, although it may be regarded with no favour.

I think that the decree of the Master of the Rolls must be reversed, and that it must be ordered that, upon the Plaintiff, Sir *A. Webster*, paying to the Defendant the sum of £1500, with interest to the day of payment, and all premiums on the policy of insurance for £3500 on the life of the Plaintiff paid by the Defendant, and also upon payment of the sum of £400, with interest at £5 per cent. per month till the day of payment, the indenture of the 17th of August, 1864, and the memorandum of the 5th of January, 1865, be delivered up, and in the meantime stand as securities for such payments. The Plaintiff must pay the costs of the suit.

July 10. This cause was set down to be spoken to on the minutes, as to the rate of interest to be allowed, and as to the costs of the appeal. On the latter point, *Baring* v. *Harris* (1), and *Phillips* v. *Hudson* (2), were referred to, and it was argued that the costs of a redemption suit were always added to the amount to be paid on redemption.

The LORD CHANCELLOR said that he never meant to lay down as a rule, that whichever party was in the wrong must pay the costs of the appeal, which must always be in the discretion of the Court

(1) 10 Jur. (N.S.) 1190. (2) Law Rep. 2 Ch. 243.

and that in this case he never intended to give the costs of the appeal.

Usual decree for redemption on payment by the Plaintiff to the Defendant, within six months, of the sum of £1500, with interest at £1 per cent. on the sum of £3300 down to 17th of August, 1865, and afterwards on £1500 at £5 per cent.; and of the sums paid by the Defendant for premiums, with interest thereon; and of the sum of £400, and interest thereon at the rate of £5 per cent. per month. Decree for sale in default of redemption; and that, in the meantime, the indenture, &c., should stand as security for the sums so to be paid. That the Plaintiff should pay the Defendant his costs of this suit down to the date of the decree, including his costs, charges, and expenses, as mortgagee. No costs of the appeal; deposit to be returned.

Solicitors for the Plaintiff: Messrs. *Capron, Brabant, & Co.*
Solicitor for the Defendant: Mr. *W. M. Kearns.*

L. JJ.
1867
May 6, 7.

Ex parte MAUDE. *In re* BRAGINTON.

Bankruptcy—Proof by Firm against Estate of one Partner—Dealings between Trade and Trade—Partner competing with his own Creditors.

B., a banker at *Torrington*, entered into partnership with *M.*, a merchant in *London*, and *P.*, a merchant in *India*, as merchants, under the firm of *M. & Co.*, and by the partnership deed *B.* and *M.* mutually covenanted to bring £6500 each into the business. There was also a subsidiary agreement that *B.* should accept bills for the firm at a commission, and that the firm should negotiate them, and keep *B.* in funds to meet the acceptances. *B.* became bankrupt, and *M.* and *P.* executed deeds of arrangement with their creditors.

M., on behalf of the firm of *M. & Co.*, claimed to prove in *B.'s* bankruptcy for a sum of £5082 due from him to the firm on their current account, and for £2773 due from *B.* to *M.* on the covenant in the deed for capital not brought in by *B.*:—

Held (affirming the decision of the Commissioner), first, that the transactions between *B.* and *M. & Co.* were not dealings between trade and trade so as to take the case out of the rule against a firm proving a debt against the estate of one of the partners; and that the fact of all the partners being insolvent, and therefore having no personal interest, did not prevent the application of the rule against a partner competing with his own creditors: secondly, that the sum due on the covenant being due on account of the partnership, it could not be proved by one partner against the estate of his co-partner without first taking the accounts of the partnership.

THIS was an appeal from a decision of Mr. Commissioner *Andrews*, of the *Exeter* Court of Bankruptcy, disallowing the claim of the Appellant, *C. H. Maude*, to prove against the estate of the bankrupt, *George Braginton*, for three sums of £5082 19*s.* 7*d.*, £2773 17*s.* 6*d.*, and £3589, under the following circumstances:—

Towards the end of the year 1864, the bankrupt, who was a banker at *Torrington* in *Devonshire* carrying on business alone but under the style of *Braginton, Rimington, & Co.*, *Maude*, who was resident in *London*, and *Passmore*, who was a merchant in *India* carrying on business at *Bombay* under the firm of *Passmore & Co.*, entered into partnership as merchants and commission agents under the style of *C. H. Maude & Co.* The deed of partnership was dated the 1st of November, 1864, and thereby *Maude* and *Braginton* mutually covenanted with each other that *Maude* should bring into the partnership £6500 at once, and that

Braginton should bring in £6500 if and when it might be required. *Passmore* was not to bring in any capital, but was to use his influence to bring business to the firm from *India*. *Maude* accordingly borrowed the sum of £6500 from a friend of his and brought it into the business, but *Braginton*, although often required to do it by his partners, brought in only the sum of £3726 2*s*. 6*d*., leaving the sum of £2773 17*s*. 6*d*. due upon his covenant. There was a subsidiary agreement between *Braginton* and his partners in the firm of *C. H. Maude & Co.*, that when purchases were made on behalf of the firm bills should be accepted by *Braginton & Co.* at a commission of £1 per cent., and that *C. H. Maude & Co.* should negotiate the bills, they engaging to keep *Braginton & Co.* in funds to meet the acceptances.

On the 27th of May, 1865, *Braginton* was adjudicated bankrupt on his own Petition. On the 16th of September, 1865, *Maude* executed a deed of inspectorship for winding up the affairs of *C. H. Maude & Co.* and his own private estate, which deed was registered under the 192nd section of the *Bankruptcy Act*, 1861. *Passmore & Co.* also stopped payment in the course of the same year, and *Passmore* executed a deed of assignment in *India* to trustees for the benefit of his creditors.

The first proof, namely, for £5082 19*s*. 7*d*., was tendered by *Maude*, with the consent of the inspectors of his deed, on behalf of his firm, for the balance of the general account between the firms of *C. H. Maude & Co.* and *Braginton & Co.* The second, namely, for £2773 17*s*. 6*d*., was tendered by *Maude*, on behalf of the inspectors, for the balance due from *Braginton* upon the covenant contained in the partnership deed of the 1st of November, 1864. The third, for £3589, was for bills drawn by *Braginton* in rupees, and indorsed to *C. H. Maude & Co.* as security (as they alleged) for a sum of £500 due from him to the firm.

The Commissioner having disallowed all these proofs, except for about £31, part of the first sum, *Maude* appealed from his decision. The third claim depended upon the effect of certain documentary and other evidence, and involved no question requiring a report. The Lords Justices affirmed the decision of the Commissioner on this claim without hearing the counsel for the assignees.

L. JJ.
1867
Ex parte MAUDE. *In re* BRAGINTON.

Mr. *Kay*, Q.C., and Mr. *Edlin* (of the common law bar), for the Appellant:—

With respect to the first proof, for £5082 19*s.* 7*d.*, it was rejected by the Commissioner, relying on the authority of *Ex parte Sillitoe* (1), on the ground that the two firms of *C. H. Maude & Co.* and *Braginton & Co.* were not carrying on business as distinct trades, but were merely assisting one another financially. But the fact that *Braginton & Co.*, being bankers, dealt in money, does not make their trade the less distinct. Their account with *C. H. Maude & Co.* was simply a banking account, and was not in any way mixed up with the accounts of the latter firm: *Ex parte St. Barbe* (2); *Ex parte Castell* (3).

But supposing the trades were not distinct within the meaning of the authorities, the reason on which those authorities are based, namely, that a partner cannot prove so as to compete with his own creditors, does not apply to this case. For, as both the firms are insolvent, there can be no surplus, therefore the partners have no interest personally; the only question is between the creditors of the two firms. To apply the rule in such a case, would be to work an injustice to the creditors of *C. H. Maude & Co.* The cases of *Ex parte Topping* (4), and *Ex parte Gill* (5) are directly in point.

The same argument applies to the second claim, which arises on the covenant between *Braginton* and *Maude*. This was a personal covenant with *Maude*, although it is true that the money was to be used in the partnership. *Maude* can prove, as agent for the firm: *Ex parte Evans* (6); *Ex parte Mitchell* (7); *Ex parte Hodgkinson* (8). He was the covenantee, and is the proper person to prove; and he is able to do so, with the consent of the inspectors of his deed.

Mr. *Druce*, Q.C., and Mr. *Montague Bere* (of the common law bar), for the assignee of *Braginton & Co.*:—

The question, so far as regards the first claim, is concluded by the

(1) 1 Gly. & J. 374.
(2) 11 Ves. 413.
(3) 2 Gly. & J. 124.
(4) 13 W. R. 445, 11 Jur. N.S. 210
(5) 9 Jur. (N. S.) 1303.
(6) 2 D. M. & G. 948.
(7) 14 Ves. 597.
(8) 19 Ves. 291, 293.

authorities. *Ex parte Sillitoe* (1); and *Ex parte Williams* (2), are directly in point. The distinction attempted to be drawn by the other side between a case where there may be a surplus, and where both firms are insolvent, has no foundation. *Braginton* being a partner in *C. H. Maude & Co.*, that firm cannot prove in *Braginton's* bankruptcy, whether there be a surplus or not, without *Braginton* competing with his own separate creditors and diminishing the fund from which they are to be paid.

With respect to the second claim, although in form the covenant was with *Maude*, the money to be paid was part of the partnership assets; and one partner cannot prove against another for a debt due to the partnership. The case of *Ex parte Topping* (3) does not apply, for there the debt was due from one partner to another, entirely independently of the partnership.

Mr. *Kay*, in reply.

SIR G. J. TURNER, L.J., after delivering judgment on certain claims by other creditors in *Braginton's* bankruptcy, continued:—

Maude's claim is, first, to prove for a sum of £5082, said to be due to *C. H. Maude & Co.* from *Braginton & Co.* It is said that this was a trade dealing between *Maude & Co.* and *Braginton & Co.*, falling within the excepted case in which proof is allowed in respect of trade dealings between one firm and a member of that firm. Now I think there was here no such case of trade dealing as to come within the exception. It was nothing more nor less than *Braginton* becoming the banker of the firm, and agreeing, as the monied partner of the firm, to indorse and accept their bills. It was part of the arrangements of the partnership; and it appears to me that, if authority is wanted, *Ex parte Sillitoe* is clear. Lord *Eldon* there says (4): "Another relaxation of the rule was therefore admitted, that where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted; but then the question, what is a dealing in a distinct trade, is always to be looked at with great care." And again: "I take it to be clear that if an individual partner has nothing more to say

(1) 1 Gly. & J. 374.
(2) 3 M. D. & D. 433.
(3) 13 W. R. 445.
(4) 1 Gly. & J. 383.

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than this, that he has lent £100 to his partnership, the strict rule immediately applies to him, and shuts him out from the benefit of proof. If it were sufficient to state that the partner would not have lent the £100 but as a separate trader, the rule is at an end. We are not therefore merely to consider the question whether *John* and *William Jackson* were partners as ironmongers, but whether this is to be considered a transaction between trade and trade; and in looking at the circumstances with a view to that question great care is necessary, lest we establish a principle which might in its consequences be the destruction of the rule; and if it be supposed that Mr. *Goodchild*, or any individual of the six, had been a separate trader, coal dealer, or corn dealer, and had with his separate moneys retired a bill discounted at the *Bank of England*, is it to be said that, because he is a separate trader, therefore the retiring of that bill is to make him a creditor to prove against the creditors of the partnership? And if that would not entitle the individual to prove, is there any distinction between the case of one separate trader and the case of two individuals who are separate traders in partnership? It is true you must look at the whole series of transactions; but if Mr. *Goodchild* for ten years had been advancing money to his firm till he had advanced £5000, if you please, and all the members of the firm had considered him as a creditor, and in their partnership books had stated him to be a creditor for the money advanced, and in his books he had stated the partnership to be debtor to him, still the same principle that would not permit him to prove the £100 would apply to the £5000. The question therefore to be decided here is, what is the principle upon which it can be said that the rule of law is to be relaxed in respect of the dealings of these two partners, because they were ironmongers, not dealing in the trade of ironmongers, not dealing in their separate articles, but dealing for the convenience of the general partnership, by advancing money to retire bills discounted by the *Bank of England?*" The same principle applies in the present case. Is not this a dealing by *Braginton*, for the convenience of the general partnership, to advance money to retire bills? The case of *Ex parte Sillitoe* (1), in my opinion, must govern this case.

(1) 1 Gly. & J. 374.

The next claim is for a sum of £2773 17*s.* 6*d.*, said to be due upon the covenant in the partnership deed, whereby *Braginton* covenanted with *Maude* to bring in £6500, if and when required. This is a proof attempted to be made by the inspectors, or rather by *Maude* on behalf of the inspectors, that is by one insolvent partner against the estate of another insolvent partner, for a debt alleged to be due to the partnership. There can be no doubt that the £6500 was to become assets of the partnership, and you could not take an account of the partnership property without taking into account all the money paid into the firm by *Braginton* and *Maude*, in pursuance of their respective covenants. Now, can the assignee of one insolvent partner prove against the estate of another bankrupt partner for a debt due to the firm, without any account being taken of the dealings and transactions of the partnership? In my opinion he clearly cannot do so. Mr. *Kay* argued that a partner could proceed at law against a debtor to the partnership, and if so, why might he not proceed against one of the partners in bankruptcy? But there is a distinction between a debt due from a debtor to the partnership, independently of any partnership account, and a debt due from a partner to the partnership upon a partnership account. When a solvent partner sues a debtor to the firm, every member of the partnership has a common interest in the recovery of the debt; but when you have a proof by one insolvent partner against the estate of another, the interests are not in common. The partner who is charged has a right to say, that though he is a debtor in respect of one transaction, he is a creditor upon others, and that the whole account must be taken between them, in order to ascertain whether there is such a debt or not. Upon these grounds I think that this appeal must be dismissed with costs.

LORD CAIRNS, L.J., after disposing of the claims by the other creditors, continued:—

With regard to the appeal of *Maude*, that was directed to three items, one of which we disposed of without calling upon the counsel for the assignees. As to the two others, the first is attempted to be maintained on the principle that, as between trade and trade, a partnership has been sometimes allowed to prove

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against one of its members, and *vice versâ*. For the reasons given by my learned brother, I entirely agree that this is not a case of trade and trade. With respect, therefore, to this proof, as well as to the second proof, the real question is, what is the character of the debts which constitute the claims? I think there can be no doubt that they are both claims to prove partnership debts of *Maude & Co.*, and the person who claims to prove is *Maude* himself, one of the partners, or, more properly, the inspectors of the deed which he has executed for the benefit of his creditors. Now, I do not desire to express any opinion upon many of the points which have been argued in this case, but upon this point I have no doubt whatever, that one individual partner cannot prove against the estate of his co-partner for any one debt in respect of the partnership. How it would be if the accounts of the partnership were taken in a proper way, and a balance appeared to be due from *Braginton*, I express no opinion. I think the proof was rightly disallowed by the Commissioner, and the appeal must be dismissed with costs.

Solicitor for the Appellant: Mr. *W. A. Crump.*

Solicitors for the Assignees: Messrs. *Linklaters, Hackwood, & Addison.*

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Bankruptcy—Resolution suspending Proceedings—Jurisdiction of Commissioner —Bankruptcy Act, 1861, *ss.* 110, 136.

5 Ch 485

The claim of a creditor in a bankruptcy was adjourned by the Commissioner. Before the further consideration of the claim a resolution was passed, under the 110th section of the *Bankruptcy Act*, 1861, that the proceedings in bankruptcy should be suspended, and the estate administered out of bankruptcy:—

Held, that the Commissioner, notwithstanding the resolution, had jurisdiction, under the 136th section of the *Bankruptcy Act*, 1861, to inquire into the disputed claim.

THIS was an appeal from an order of Mr. Commissioner *Winslow*, refusing an application for a private sitting to examine Mr.

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England, a creditor of the bankrupt, *Harriette Wickham*, with reference to his claim upon her estate.

Harriette Wickham was adjudicated bankrupt on the 21st of December, 1865, and on the 3rd of January, 1866, *England* tendered a proof for £3397. The proof was opposed by the other creditors, but ultimately it was admitted by the Commissioner to the extent of £2147 only, and adjourned as to the remaining sum of £1250.

On the same day the creditors held a meeting, under the 110th section of the *Bankruptcy Act*, 1861, which was adjourned to the 17th of January, when a resolution was passed by a majority in value of the creditors, to the effect that the proceedings in bankruptcy should be suspended, and that the estate and effects of the bankrupt should be wound up and administered by the assignee as manager out of bankruptcy, in like manner as if the same remained in bankruptcy, so far as the difference in the mode of administration would admit.

The bankrupt then applied for and obtained her discharge, and, at the same sitting, the Commissioner examined *England* with respect to his claim for £1250, but said that it was impossible to decide upon it until he had filed a cash account.

On the 1st of April, 1867, the Appellant, who had been appointed assignee, applied to the Commissioner for a sitting to consider the adjourned proof, notwithstanding the resolution of the 17th of January, 1866, but the Commissioner refused the application on the ground that the resolution of the creditors had taken away his jurisdiction in the matter, for all purposes except for the order of discharge. In coming to this conclusion the Commissioner relied upon the case of *In re Carter* (1), which had been recently decided by the Lord Chancellor. From this order the creditors' assignee appealed.

Mr. *Reed*, for the Appellant:—

By the passing of a resolution under the 110th section the bankruptcy is not annulled, nor is the jurisdiction of the Court taken away; the proceedings are merely suspended: *Ex parte McKerrow* (2). The 136th section of the *Bankruptcy Act*, 1861 (3),

(1) Law Rep. 1 Ch. 170.
(2) 13 W. R. 1002.
(3) The 136th section is as follows: "In case of any claim, dispute, or dif-

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was intended to apply to such cases as the present. It is not confined to questions under deeds of arrangement, but expressly refers to resolutions of the creditors.

[The LORD JUSTICE LORD CAIRNS:—That section only applies to cases in which there has been "a claim, dispute, or difference." How does that appear in the present case?]

It is true that there had been no formal refusal by the assignee to allow the creditor's claim, but the order of the Commissioner previous to the passing of the resolution had raised the dispute between the assignee and the creditor. The Commissioner would have had no difficulty in proceeding, if it had not been for the case of *In re Carter* (1).

England, the creditor, did not appear.

SIR G. J. TURNER, L.J.:—

We are of opinion that the Commissioner has power under the 136th section of the *Bankruptcy Act*, 1861, to make further inquiry as to this debt. It is clear that the section was intended to apply to resolutions suspending the proceedings, as well as to deeds of arrangement. It only applies, however, in cases where there has been a "claim, dispute, or difference." We think it sufficiently

ference between the official assignee, the creditors' assignee, and the creditors, or any of such persons, or between any persons claiming under a trust deed, deed of composition, or arrangement, relating to any bankrupt's or debtor's estate, or to any money or property claimed as part of the estate of any bankrupt or debtor, either party may apply to the Court having jurisdiction in the bankruptcy, and in other cases to the Court in *London*, and it shall be lawful for the Court to determine the same, and to summon and examine upon oath the official or creditors' assignee, trustee, or any other person whomsoever, as to any matters and things concerning the bankruptcy or trust estate, and to direct such inquiries, and to give such directions and make such orders relative thereto as shall to the Court seem just and expedient, and to award costs personally, or in any other manner, against the official or creditors' assignee, trustee, or any other person: Provided that in all cases in which a resolution has been come to by a majority in number and value of the creditors assembled in a meeting, regard shall be had by the Court to such resolution, and the same shall not be varied or set aside by the Court, unless such resolution shall in the opinion of the Court be unjust or inequitable, and not fit to be binding and conclusive under this Act.

(1) Law Rep. 1 Ch. 170.

appears that there was a dispute or difference in this case. The order must be made in the following form:—Discharge the order of the Commissioner, and it appearing that there is a claim by *England* for the full amount of his debt, which is disputed by the assignee to the extent of £1250, let the Commissioner appoint a sitting to consider the disputed claim.

LORD CAIRNS, L.J.:—

I agree.

Solicitors for the Appellant: Messrs. *Ashurst, Morris, & Co.*

Ex parte ROOTS. *In re* ROOTS.

Bankruptcy Act, 1861, *s.* 192—*Composition Deed—Unreasonableness.*

A debtor, by deed, registered on the 2nd of November, 1866, under sect. 192 of the *Bankruptcy Act*, 1861, covenanted to pay his creditors 2*s.* 6*d.* in the pound within two months from the registration; and the creditors released their debts, subject to a proviso for avoiding the deed on default in payment of the composition. Default was made, and on the 3rd of January, 1867, a similar deed was registered, with the assent of the requisite majority of creditors, by which the debtor covenanted for payment of 2*s.* 6*d.* in the pound within seven days after the expiration of four months. A non-assenting judgment creditor applied for leave to issue execution, on the ground that the deed was unreasonable, for that the composition, having regard to the state of the debtor's affairs, was unreasonably small, and that the second deed provided for payment only of the same composition as the first deed, after a longer time, and without any additional security. The Commissioner gave leave to issue execution:—

Held, that the deed was not *ex facie* void; the circumstance that it had been immediately preceded by the other deed being not decisive against its validity, but only a circumstance rendering strict investigation proper; and that the order for leave to issue execution ought to be discharged, and the case remitted to the Commissioner for further investigation.

Whether a registered deed can be treated as void against a non-assenting creditor for unreasonableness, because the amount of composition is too small —*quære.*

THIS was an appeal by a debtor who had executed a registered composition deed from an order of the Commissioner allowing a judgment creditor to issue execution.

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The judgment was recovered on the 13th of August, 1866, for £202 debt, and £11 14*s.* 4*d.* costs.

By indenture dated the 5th of October, 1866, expressed to be made between the debtor of the one part and his creditors of the other part, the debtor covenanted, within two calendar months from the registration, to pay his creditors a composition of 2*s.* 6*d.* in the pound on the amount of their respective debts, which debts the creditors thereby released. The deed contained a proviso making it void on default in payment of the composition within the time above mentioned.

This deed was registered under sect. 192 of the *Bankruptcy Act*, 1861, on the 2nd of November, 1866, the consent of the requisite majority of creditors having been obtained, the judgment creditor not concurring. The debtor made default in payment of the composition.

On the 19th of December, 1866, a summons was taken out by the judgment creditor for leave to issue execution against the debtor, notwithstanding the composition deed, on the ground that the deed was bad in law, and did not contain a true statement of his creditors, and was obtained by a material mis-statement of his assets and liabilities circulated among his creditors, and for an examination of the debtor before the Court of Bankruptcy on these matters.

The debtor, on the 3rd of January, 1867, executed a deed of that date, purporting to be made between himself of the one part and his creditors of the other part, whereby he covenanted to pay the creditors 2*s.* 6*d.* in the pound on their debts on or before the seventh day after the expiration of four calendar months from the date of registration, and the creditors released their debts. This deed also contained a proviso making it void if the debtor should make default in payment of the composition, or should make or attempt to make any assignment for the benefit of his creditors, or any arrangement with his creditors different from that present arrangement.

This deed was registered under the 192nd section on the day of its date, the consent of the requisite majority of creditors having been obtained, but not that of the judgment creditor.

The judgment creditor, on receiving notice of the registration of

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the latter deed, abandoned his summons, which had not been served, but subsequently obtained and served a fresh summons to the same effect as the former. He entered into evidence as to the state of the debtor's assets and liabilities, with a view of proving that the composition which the assets were sufficient to pay was a much larger composition than was made to appear by the debtor's statements.

On the 28th of February, 1867, the Commissioner made an order giving the creditor leave to make his judgment available, notwithstanding the composition deed and the certificate of protection which had been granted under it.

Mr. *Druce*, Q.C., and Mr. *Bagley*, for the debtor, in support of the appeal motion:—

The first deed having become void, matters stood as if it had never existed; the creditors were remitted to their rights, and the second deed forms a perfectly independent transaction. The Commissioner seems to have thought it a mere device to delay creditors; but the statutory majority of them having assented to it, the deed has all the requisites of a good deed, and no ground has been shewn for giving the judgment creditor leave to proceed in spite of it.

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the creditor:—

The whole transaction is a fraud on the Act, and unreasonable as against non-assenting creditors. A deed which contains unreasonable provisions is void: *Ex parte Morgan* (1); *Lyne* v. *Wyatt* (2); *Dell* v. *King* (3); *Coles* v. *Turner* (4). The composition in the present case is so unreasonably small as to vitiate the deed, there being evidence that the debtor could pay much more.

[The LORD JUSTICE LORD CAIRNS:—None of the cases to which you have referred appear to warrant the Court's sitting in judgment upon the question, whether a deed is unreasonable as regards the amount of composition. They rather turn on the question, whether the deed puts some creditors in a different position from others.]

The deed in *Coles* v. *Turner* was the same as regarded all cre-

(1) 1 D. J. & S. 288, 301; 9 Jur. N.S. 559
(2) 18 C. B. (N. S.) 593; 11 Jur. N.S. 446
(3) 2 H. & C. 84; 10 Jur. N.S. 427
(4) 18 C. B. (N. S.) 736; 12 Jur. N.S. 608; L. R. 1 C. P. 373 Ex. Ch.

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ditors; and though the decision was reversed (1), the principle was left untouched.

[The Lord Justice Lord Cairns:—Under that deed creditors whose debts were of different natures might be placed in different positions.]

[The Lord Justice Turner:—Must not the deed be unreasonable on the face of it to enable the Court to set it aside?]

If that element be requisite, we submit that it exists. A mere personal covenant by the debtor to pay to the creditors the same composition as before, but after a much longer time, is unreasonable. *Boulnois* v. *Mann* (2), is in our favour, and *Ex parte Morrison* (3) is the same in principle.

Sir G. J. Turner, L.J.:—

With all respect to the learned Commissioner, we cannot follow the reasons which he has given for allowing execution to issue. He has proceeded on the ground that the deed is wholly void. It may or may not be a void deed; that depends on the whole of the circumstances of the case. The fact of the succession of similar deeds is an unfavourable circumstance, one which undoubtedly makes it the duty of the Commissioner to investigate the case very strictly, but I do not think that it is necessarily decisive against the deed. I give no opinion on the points raised as to unreasonableness, or as to the deed being fraudulent. I cannot say that it is *ex facie* invalid, and I think that the order for leave to issue execution ought to be discharged, and the case sent back to the Commissioner for further investigation upon the summons, one object of which is the examination of the debtor.

Lord Cairns, L.J.:—

The suspicions and vigilance of the learned Commissioner were very properly excited by the circumstance that the first deed, which provided only for the payment of a small composition, having become void through non-payment, was immediately fol-

(1) Law Rep. 1 C. P. 373; (2) Law Rep. 1 Ex. 28;
(3) 33 L. J. (Bkcy.) 47,

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lowed by a similar deed. But I cannot go further than this. The deed may be a perfectly good deed; its being a second deed is, in my opinion, only a circumstance which is to be taken into consideration among all the other circumstances of the case. The second deed is, in substance, merely a deed for extending the time limited by the former for payment of the composition, and we cannot say that such an extension of time is necessarily injurious to the creditors.

I agree that the order for leave to issue execution ought to be discharged, and that the case ought to go back to the Commissioner for him to proceed on the original summons.

Solicitors for the Debtor: Messrs. *Linklaters, Hackwood, & Addison.*

Solicitor for the Judgment Creditor: Mr. *S. G. Ashwin.*

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May 7, 10; *June* 4.

Bankruptcy—Deed of Arrangement—Unreasonable Amount of Composition—Leave to issue Execution—Bankruptcy Act, 1861, *ss.* 192, 198.

The power given by the 192nd section of the *Bankruptcy Act,* 1862, enabling the majority of creditors assenting to a deed of arrangement to bind the non-assenting minority, is a statutory power, and must be exercised *bonâ fide* for the benefit of all the creditors. If, therefore, there is a fraudulent bargain for the benefit of some of the creditors, or if the majority of creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the Court will hold the deed not to be binding on a non-assenting creditor, and will give him leave to issue execution on his debt under the 198th section.

But if the assenting majority appear to have exercised their discretion *bonâ fide* for the benefit of the creditors, the Court will not sit in review on the *quantum* of the composition.

THIS was an appeal from an order of Mr. Commissioner *Winslow,* under the 198th section of the *Bankruptcy Act,* 1861, giving leave to *William Foster,* a judgment creditor of *David Cowen,* to issue execution, notwithstanding a deed of composition executed by the debtor.

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The judgment on which leave was given to issue execution was for £260, and was signed on the 1st of August, 1866. It was obtained in an action upon an award in respect of matters in difference between the judgment creditor and the Appellant, but after the judgment was obtained proceedings were taken by the Appellant to open the award, and in consequence of these proceedings it was not until the 14th of September, 1866, that the judgment creditor was in a position to put in force the judgment. The deed of composition bore date the 18th of September, 1866, and was registered on that day. The judgment creditor was in no way party or privy to the deed, but it was executed by six other creditors of the Appellant, to an amount very slightly exceeding three-fourths in value of his debts, amounting to £10 and upwards. The deed contained no assignment of any part of the property of the Appellant, but merely a covenant by him for payment to his creditors of 2*s.* 6*d.* in the pound, by two instalments of 1*s.* 3*d.*, payable at three and six months. By this deed the creditors agreed to release the Appellant upon the instalments being paid, and there was a provision in the deed making it void in default of payment of the instalments.

It appeared from the evidence that the amount of debts due from the Appellant at the time of the execution of the deed was £1054, and that he was at the same time possessed of furniture which had been purchased by him in part (to the amount of £120) from one of the creditors who signed the deed; and as to the rest (to the amount of £165), by means of moneys borrowed from another of the creditors who also signed the deed; of a chronometer and a gun, also purchased by him from creditors who signed the deed for sums amounting together to about £40; of a boat of the value of about £10; and of a ship called the *Helena*, which had been purchased by him from the judgment creditor for £350, and which was sold on the 28th of September, 1866, ten days after the execution of the deed, for £300, of which £120 was paid in cash, and £180 in bills. Unless, therefore, there had been a great deterioration in the value of the property, it appeared that the debtor might have been able to pay at least 10*s.* in the pound on the debts.

It appeared, also, that two of the creditors who signed the deed

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were nearly connected with the debtor by marriage, and that the other four assenting creditors were his personal friends.

In the course of the debtor's examination, when interrogated with respect to some of the assenting creditors' debts, he stated that he expected to pay them in full, notwithstanding the deed of composition, and some of the creditors admitted that they had the same expectation; but there was no evidence of any agreement with the creditors to that effect.

Mr. *Druce*, Q.C., and Mr. *Robertson Griffiths*, for the Appellant:—

The Commissioner did not ground his order upon any suggestion that the deed contained unreasonable provisions, but he considered that it was tainted with fraud, because of the small amount of composition which the creditors agreed to take. But the majority of the creditors are the sole judges of the amount of composition which should be taken. They know better than the Court the special circumstances of the case, and they are the best judges of their own interests. This is the first time that a deed has been attempted to be invalidated on account of the smallness of the composition: *Ex parte Roots* (1). The deed is also objected to on the ground that it was devised in order to defeat the judgment creditor. But it is the object of all deeds of arrangement to defeat creditors who claim a priority, and to put all on an equal footing.

Mr. *De Gex*, Q.C., and Mr. *Reed*, for the judgment creditor:—

There have been numerous cases in which deeds of arrangement have been held not to be binding on dissentient creditors on account of their containing unreasonable provisions: *In re Rawlings* (2); *Woods* v. *Foote* (3); *Balden* v. *Pell* (4). What can be more unreasonable than accepting a composition of 2*s.* 6*d.* in the pound, when the assets are capable of paying four times that amount? The rights of the creditors are to be determined upon the same principles as if there was a bankruptcy: *In re Marks' Trust Deed* (5). The 186th section of the *Bankruptcy Act*, 1861, relating to changes from bankruptcy to arrangement, has a

(1) *Ante*, p. 559.
(2) 1 D. J. & S. 225; 9 Jur. N.S. 316
(3) 1 H. & C. 841.
(4) 12 W. R. 1004; 10 Jur. N.S. 613; 33 L.J. Ch. 213
(5) Law Rep. 1 Ch. 429.

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material bearing upon this subject. By that section, the Court is expressly directed to consider whether the terms of the deed of arrangement are reasonable, and calculated to benefit the general body of the creditors.

The circumstances in this case amount to a fraudulent use of the provisions of the Act, which is in itself a ground for setting aside the deed: *Ex parte Morrison* (1). The motives of the majority of the creditors are sufficiently apparent. They were near relations and intimate friends of the bankrupt, and conspired to defeat the dissentient creditor. It is also clear, from the examination, that there was a secret expectation, if not an actual understanding, that they should be paid in full, notwithstanding the deed.

Mr. *Druce*, in reply.

June 4. SIR G. J. TURNER, L.J.:—

The sole question on this appeal seems to me to be, whether the judgment creditor was bound by this deed;—if he was not, there cannot, I think, be any doubt that the order under appeal is right. If he was, the order cannot, I think, be maintained. I shall presently refer to the circumstances under which this deed was executed, but before doing so it may be well to consider the 192nd section of the Act. This section is in the most general terms. It embraces all deeds of arrangement between debtors and their creditors, including mere deeds of composition for the release of the debtors on part payment of their debts, without any assignment of any part of the property of the debtors, and renders such deeds binding on all the creditors as if they were parties to, and had executed the same, subject to the following amongst other conditions:—That three-fourths in value of the creditors whose debts amount to £10 and upwards assent to, or approve of, the deeds, and that the deeds are duly registered. But general as are the terms of this section it cannot, of course, be imputed to the Legislature that it intended to sanction deeds which were

(1) 33 L. J. (Bkcy.) 47, 10 Jur. N.S. 786, 3 Mac. & G. 232

tainted with fraud, nor, as I think, can the Legislature be supposed to have intended to give effect to deeds made and entered into otherwise than *bonâ fide* with a view to the benefit of all the creditors of the debtors. An extreme case may be put to illustrate this view of the section. Suppose the case of a debtor of large property more than sufficient for the payment in full of all his debts, and immediately available for the purpose, could it have been intended that the required majority of creditors should have power to bind the minority to the acceptance of sixpence in the pound, leaving the rest of the property to be enjoyed by the debtor? I think not. The power given by this section to a majority of creditors to bind the minority must, I think, be considered as, or in the nature of, a statutory power, the exercise of which will be binding only when it is fairly and *bonâ fide* exercised. Independently of what must, I think, be presumed to have been the intention of the Legislature, the words of the section seem to me to import that the absence of any taint of fraud, and the *bona fides* of the arrangement with a view to the benefit of all the creditors, were meant to be essential to the validity of the deeds. The deeds are to be binding on the non-assenting creditors, not absolutely, but only as if they were parties to and executed the same, and even creditors who were parties to, and had executed the deed, could not, as I apprehend, have been bound by them if they were tainted by fraud or *mala fides*. Courts of law in dealing with deeds of this description, with reference to other provisions contained in them, have held that the deeds must be reasonable, and these decisions at law were much pressed upon our attention in the course of the argument before us; but it would be very difficult to apply the test of reasonableness to cases like the present. How could a Court of justice determine what it would be reasonable for creditors to accept under all the varied circumstances of arrangements between debtors and their creditors? I think, therefore, that the cases at law afford us but little assistance in determining this case, and I am not disposed to go further than to say that, in my opinion, it is necessary in order to render a deed of such a description as we have here to deal with binding upon non-assenting creditors, that the deed should be free from all taint of fraud, and should be made and entered into *bonâ fide*, with a view to the

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benefit of all the creditors. In determining whether these conditions have been observed or not, I do not think that the Court will weigh with extreme nicety the propriety of the arrangement which has been made between the debtor and his creditors, or the probability that the estate of the debtor might be capable of paying more than the composition agreed upon. But in order to render such a deed as the one before us binding on non-assenting creditors, the conditions which I have mentioned must in substance have been observed.

These being the principles by which, in my opinion, our judgment in this case ought to be guided, I proceed to consider the facts which are in evidence before us. It is not disputed that the deed in question was executed for the purpose of defeating the judgment creditor, but I place no great reliance upon this, for it is clear that the assets of the debtor were not sufficient for the payment in full of all his debts, and the debtor and his other creditors acting fairly and *bonâ fide* with a view to the benefit of all the creditors were, I think, entitled to enter into arrangements for preventing the bulk of the assets being swept away by the judgment creditor. This fact appears to me to be of importance only in its bearing on the other facts of the case. The case, I think, depends upon whether these other creditors acted *bonâ fide*, and with a view to the benefit of all the creditors. [His Lordship then referred to the evidence respecting the assets of the debtor, and continued:—] It is clear, therefore, that there were assets of the Appellant sufficient for the payment of a much larger composition than 2*s.* 6*d.* in the pound. The deed was executed by creditors to an amount barely exceeding the amount required by the statute. Most, if not all, of these creditors, it appears from the evidence, executed the deed in the expectation that, notwithstanding the deed, their debts would be paid in full. It does not indeed appear that there was any positive agreement between them and the Appellant to this effect, but it is sufficiently clear from the evidence that they were friends of the Appellant, and executed the deed for his benefit, and without any regard to the rights or interests of the other creditors. There does not appear to have been any meeting of the creditors, or any examination or inquiry into the state of the Appellant's assets, or the nature and extent

of his liabilities. Under the circumstances of the case, as they appear by the evidence before us, I have no doubt whatever that this deed, if not absolutely tainted with fraud, as I strongly suspect it to have been, was not made and entered into *bonâ fide* for the benefit of all the creditors of the Appellant. I agree, therefore, in the conclusion at which the learned Commissioner has arrived, and am of opinion that this appeal must be dismissed with costs.

LORD CAIRNS, L.J.:—

The question raised in this case is one of great and general importance with reference to the clauses of the *Bankruptcy Act*, 1861, relating to deeds of arrangement between a debtor and his creditors. The position of the majority of the creditors is a very strong one; that of the minority is very weak, and requires to be carefully guarded by the Court, especially as it has been held that a deed under these sections need not contain a *cessio bonorum*. The question in this case arises under the 198th section, and in my opinion, the true effect of that section is, that when the Court is satisfied that there is any invalidity in a deed of this kind, even though the invalidity be not apparent on the face of the deed, the Court is justified in allowing a non-assenting creditor to issue execution notwithstanding the deed.

[His Lordship then referred to the facts of the case, and to the statements made in the examination of the debtor, and continued:—]

In this state of things it will be necessary to consider the bearing of the Act of Parliament. It was much pressed in argument that, wherever the Court finds a deed to be unreasonable in its provisions, it will be treated as invalid, and that it is unreasonable if the amount of composition be not in fair proportion to what the debtor is able to pay. But in my opinion there is a statutory power given to the majority of the creditors to bind the minority. They are made the judges of the propriety of the arrangement, so long as they exercise their power *bonâ fide;* and it certainly seems to me that it would be contrary to the spirit of the Act that this Court should sit in review on their decision as regards the *quantum* of composition they may agree to accept. But this is subject to the paramount obligation that this power, like all other powers,

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must be exercised fairly, so that there may be a *bonâ fide* bargain between the creditors and the debtor. If it should be found that the bargain was tainted with fraud, the arrangement will not be binding on the non-assenting creditors. If, for example, it were found that there was a bargain with some of the creditors to give them some peculiar benefit, that would be a fraud. But even without any ingredient of fraud, if the creditors, from motives of charity and benevolence, which might be highly honourable to them, were willing to give the debtor a discharge on payment of a composition wholly disproportioned to his assets, that would not be such a bargain as the Act requires, and would not bind the non-assenting minority.

The present case, in my opinion, falls within one or other of these two categories. If the debtor's own statement be taken literally, I should think there was an understanding that if the creditors would execute the deed, and so defeat the judgment creditor, they should be paid all their demands in full: this would be a fraud. But if not, the only other conclusion is, that these assenting creditors, being connected with the debtor, or his personal friends, and wishing to shew kindness and generosity to him, were content to take this nominal composition, and to give him his discharge. In that case, although the transaction might not amount to a fraud, yet it was not a *bonâ fide* bargain, and could not bind the minority. In either view of the case, therefore, the Commissioner was right, and the appeal must be dismissed with costs.

Solicitors for the Debtor: Messrs. *Cotterill & Sons.*

Solicitors for the Judgment Creditor: Messrs. *Lumley & Lumley.*

CAMPBELL *v.* ATTORNEY-GENERAL.

L. JJ.
1867
May 31.

Proceedings in Scotch Court for examination of Witnesses in an English Suit—22 Vict. c. 20—Bill to perpetuate Testimony.

Where application is made to a Scotch Court, under the 22 Vict. c. 20, to enforce the attendance of witnesses in an English suit for examination in *Scotland* before a special examiner appointed in the English suit, it is the duty of the Scotch Court to determine what witnesses are to be summoned, and what documents they are to produce, as well as to decide all questions as to privilege on the evidence which may arise on the examination.

THIS was an appeal from an order made by Vice-Chancellor *Stuart*, on the 27th of May, 1867, upon an application by the Defendant, *John Alexander Gavin Campbell*, to set aside a writ of *subpœna duces tecum*, issued on behalf of the Plaintiff, *Duncan Campbell*.

The bill was filed by the Plaintiff under the 5 & 6 Vict. c. 69, for perpetuating the testimony of certain persons relative to the pedigree of the Plaintiff, who claimed the title and estates of the Earl of *Breadalbane*, after the death without issue of his brother, *John Campbell*, who, as the Plaintiff alleged, was at present entitled to them.

The Defendants to the suit were the *Attorney-General*, *John Campbell*, *Charles William Campbell*, and *John Alexander Gavin Campbell*, who claimed the title and estates in opposition to the Plaintiff and his brother.

Replication having been filed in the suit, an order was made by Vice-Chancellor *Stuart*, on the 21st of March, 1867, on the application of the Plaintiff, that Mr. *J. M. Duncan* should be appointed examiner for the purpose of taking the examinations of witnesses in *Scotland* in the cause; and it was ordered that any party requiring the attendance of any witness, should give to all other parties ten days' notice of his intention to examine or cross-examine such witness.

On the 28th of March the Plaintiff sued out a writ of *subpœna duces tecum*, directed to the Earl of *Dalhousie*, the Hon. *Charles Baillie*, and *Alexander Currie*, who were the trustees of the estates

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of the last Marquis of *Breadalbane*, commanding them to appear before Mr. *Beavan*, one of the Examiners of the Court of Chancery, and to bring with them the deeds and documents mentioned in the schedule to the writ.

On the 14th of May, 1867, the Plaintiff presented a Petition to the Court of Session in *Scotland*, under the provisions of the *Evidence by Commission Act* (22 Vict. c. 20), setting forth at full length the commission for the examination of witnesses in *Scotland*, and the writ of *subpœna duces tecum*, with the schedule of documents, and stating that the Earl of *Dalhousie*, *Charles Baillie*, and *Alexander Currie*, and their agents, *L. Davidson* and *T. Syme*, were residing in *Scotland*, out of the jurisdiction of the Court of Chancery, and praying that the Court of Session would order the examination before Mr. *J. M. Duncan*, the examiner appointed by the Court of Chancery, of the above-named persons, at such time and place as the said examiner should appoint, and would command their attendance before the said *J. M. Duncan* for the purpose of being examined; and that the said Earl of *Dalhousie*, *C. Baillie*, and *A. Currie*, might produce and exhibit the writings and other documents above mentioned, or such of them as were in their custody, possession, or power.

On the 27th of May, the Defendant, *J. A. G. Campbell*, moved before the Vice-Chancellor to set aside the writ of subpœna, which His Honour did not think fit to do; but he made an order restraining the Plaintiff and his agents, until further order, from taking any proceedings before the Court of Session, or otherwise in *Scotland*, for the purpose of enforcing the writ of subpœna; but he was to be at liberty to make such application for the examination of the witnesses or production of the documents, as he might be advised. From this order the Plaintiff appealed.

It appeared that the Court of Session, being informed of the intention of the Defendant to apply to the Court of Chancery to set aside the writ of subpœna, had postponed the consideration of the Petition until the result of the application was known.

Mr. *Bacon*, Q.C., and Mr. *Downing Bruce*, for the Plaintiff:—

The order of the Vice-Chancellor was based on a misunderstanding of the effect of the 22 Vict. c. 20, on which the proceedings

in *Scotland* were founded (1). The jurisdiction of the Court of Session is founded on the commission appointing the special examiner; and it is then in the discretion of the Court of Session to determine what witnesses are to be examined, and the time and place of their attendance.

[The LORD JUSTICE LORD CAIRNS :—The Petition to the Court of Session sets out the *subpœna duces tecum*, and appears to make that writ the foundation of the jurisdiction. It would seem that the Judges of the Court of Session were influenced by that suggestion, for they postponed the consideration of the Petition until the result of the application to set aside the subpœna was known.]

The writ of subpœna is only set out to inform the Court of all the facts. The 1st section of the Act directs that the Scotch Court shall make an order for the attendance of witnesses, and the production of writings and documents, "to be mentioned in such order," that is, the order of the Scotch Court. What questions are to be answered by the witnesses, and whether they can or not refuse to produce the documents which they bring with them, is in the discretion of the Scotch Court, which has full power

(1) The 1st section of that statute is as follows :—"Where upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized by commission, order, or other process, the obtaining the testimony in, or in relation to, any action, suit, or proceeding pending in or before such Court or tribunal, of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such Court or Judge in a cause depending in such Court or before such Judge."

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to protect the witnesses under the 4th section (1). The Court of Chancery has no power to interfere with this discretion.

Mr. *Kay*, Q.C., Mr. *Boyd Kinnear*, and Mr. *W. D. Gardiner*, for the Defendant, *J. A. G. Campbell*:—

The suit is simply to perpetuate testimony; but the Plaintiff is endeavouring to make it operate as a suit for discovery. We say that the documents set out in the schedule relate to the Defendant's title, and the Plaintiff has no right to their production. It is true that the 4th section gives power to the Court in *Scotland* to protect a witness who declines to answer on the ground of privilege; but it does not protect the Defendant from having his title deeds produced by the witnesses.

[The LORD JUSTICE LORD CAIRNS referred to *Cholmondely* v. *Clinton* (2).]

The Plaintiff founded his Petition in the Court of Session on the *subpœna duces tecum*, and the Vice-Chancellor was therefore right in restraining him from proceeding. But we contend that neither the writ of subpœna, nor the order appointing a special examiner, is such an order as will give the Court of Session jurisdiction to enforce the production of the documents. The Court of Chancery is the Court to decide what documents are to be produced, and must make an order to that effect, and the Scotch Court will then give effect to the order. The suit being an English one, all questions in it ought to be decided by English law. The Act was not intended to apply to such a suit as a suit to perpetuate testimony; for the Plaintiff can take proceedings for that purpose in the country in which the witnesses are resident.

(1) The 4th section is as follows:— "Provided also, that every person examined under any such commission, order, or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause pending in the Court by which, or by a Judge whereof, or before the Judge by whom, the order for examination was made, would be entitled to, and that no person shall be compelled to produce, under any such order as aforesaid, any writing or other document that he would not be compellable to produce at a trial of such a cause."

(2) 19 Ves. 261.

Mr. *Brudenell Bruce*, for the Defendant *John Campbell*.

Mr. *Wickens*, for the Attorney-General.

SIR G. J. TURNER, L.J.:—

This motion was to discharge an order of Vice-Chancellor *Stuart*, made on an application to set aside a subpœna obtained by the Plaintiff for the examination of witnesses. His Honour did not set the subpœna aside, but ordered that the Plaintiff should be restrained from taking any proceedings before the Court of Session, or otherwise in *Scotland*, for enforcing the writ. The application was simply to discharge the order for the subpœna. It does not seem to me that there was any ground for discharging that subpœna. It was directed to the trustees, who are now resident in *Scotland*, but who are often in *England*, and when they are in *England* the subpœna will be available against them. Possibly, therefore, it would be sufficient to say that there was no ground for the application to the Vice-Chancellor, and that the motion ought simply to have been refused. The Vice-Chancellor seems to have taken the same view, and he refused to discharge the subpœna; he has, however, directed that the Plaintiff should be restrained from taking proceedings in *Scotland* to enforce it, but he was to be at liberty to make such application for the examination of the witnesses, or production of the documents, as he might be advised. I at first supposed this to refer to applications to the Courts of *Scotland*, but it is clear that it must have been meant to extend to applications to this Court to enforce the production of the documents. But the trustees are not before the Court, and it would be impossible in such a suit to make any order against the trustees for production of documents. Therefore that part of the order was, in my opinion, nugatory.

An important question, however, has been raised on the following point: This is a suit for perpetuating testimony, and after the filing of the bill an order was made by which a special examiner was appointed to take the examination of witnesses in *Scotland*, and it was ordered that the party requiring the attendance of any witnesses should give ten days' notice of his intention to examine them to all other parties. That order was made the foundation of

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proceedings under the Act of the 22 Vict. c. 20, for taking evidence in *Scotland* in suits pending in *England*. That Act provides in effect (sect. 1) that where, upon an application for this purpose, it is made to appear to any Court or Judge in *Scotland* that any Court in *England* has duly authorized by commission, order, or other process, the obtaining the testimony in, or in relation to, any action, suit, or proceeding, pending in the English Court, of any witnesses out of the jurisdiction of the English Court, and within the jurisdiction of the Scotch Court, it shall be lawful for the Scotch Court to order the examination of the witnesses. It then goes on to provide the means by which the Court in *Scotland* may enforce the examination before the person or persons appointed by the English Court; and it empowers the Court in *Scotland*, "by the same or any subsequent order, to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just." There is, then, a distinct power given by this Act to compel the attendance of witnesses for examination, and to compel the production of documents for that examination; for I think it is clear that the production of documents must mean the production of documents for the purpose of such examination, and that it is entirely left to the Court of *Scotland* to determine what persons are to be ordered to attend for examination, and what documents are to be produced. If there was any doubt upon that point I think it would be removed by the 4th section. [His Lordship read the section.] By this section it is left to the Court which orders the examination to determine what protection should be given to the witnesses, and what ought to be done as to the production of documents.

The case was argued as if this were an order for the production of documents for inspection by the Plaintiff. It is no such thing. It is merely a subpœna to compel the attendance of witnesses, and any witness may refuse to produce the documents which he brings with him, and the Court must determine at the time whether he is bound to produce them or not.

It was also argued that great inconvenience would arise from

vesting in the Courts of *Scotland* the power of determining what documents ought to be produced in a cause pending in *England*. But the answer to that objection is, that whatever may be the inconvenience, the Legislature has expressly given them the power.

The only anxiety I feel is, that we should not seem to interfere with the discretion which the Court of *Scotland* is bound to exercise. They are certainly constituted the judges in this case, and I have no doubt that they have power under the 4th section to afford persons protection against being obliged to produce the documents in their possession. The order to be made must be in the following form :—

Discharge the order of the Vice-Chancellor. Refuse the motion before the Vice-Chancellor. But this order is not to prejudice, affect, or interfere with, any order which the Court of *Scotland* may think fit to make as to the attendance of any persons for the purpose of being examined, or, if it shall think fit, as to the production of any writings or other documents, having regard to the provisions of the statute 22 Vict. c. 20.

LORD CAIRNS, L.J. :—

The subpœna was regular in form, it was regularly issued, and it may be used in *England* against the persons named when they come within the jurisdiction; therefore, in my opinion, there is no ground for setting it aside.

But it is said that, although it may not be set aside, the Plaintiff ought to be restrained from proceeding on it in *Scotland*. Now, if the proceedings of the Plaintiff in *Scotland* are regular in form, he has a statutory right to go on with them; if they are not regular, he has no such right, and it must be assumed that the Court of Session will refuse his application. It is not for us to say whether the provisions of the statute have been complied with—that is for the Court of Session to decide. But I am not satisfied that there has been any such irregularity.

My only anxiety arises from the suggestion that has been made that the Court of Session has been influenced by the information that the Defendant intended to move to set aside the subpœna, and on that ground postponed the proceedings before them. If, therefore,

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our order only negatived the right of the Defendant to have the subpœna set aside, the Court of Session might suppose that we had expressed an opinion as to what documents the Plaintiff had a right to have produced. It will be right, therefore, to guard the order by inserting the words proposed by my learned brother.

As to the costs: I should have thought it right to adhere to the rule that the costs should follow the result, had it not been for the form of the proceedings taken by the Plaintiff. For, although I cannot suppose that the Court of Session would be ultimately misled, yet it appears that the subpœna was put forward in order to give colour to the opinion that this Court had decided that the documents ought to be produced. I think, therefore, that, as between him and the Defendant, there must be no costs. The Defendant must pay the costs of the Attorney-General.

Solicitors for the Plaintiff: Messrs. *Steele & Sons.*
Solicitor for the Defendant: Mr. *J. W. Nicholson.*

L. JJ. 1867 *May* 7.

In re DUCKWORTH.

Company—Winding-up—Call—Bankrupt Contributory—Set-off—Companies Act, 1862, *s.* 95—*Bankruptcy Act*, 1849, *s.* 171.

Where a shareholder in a limited company has executed a deed of assignment, which has been registered under the *Bankruptcy Act*, 1861, the trustees of that deed are entitled to set off a debt due to the shareholder from the company against a demand for calls made by the official liquidator of the company.

T. J. DUCKWORTH was the holder of 100 £20 shares in the *Xeres Wine Shipping Company, Limited*, and was also a creditor of the company for the sum of £5000. On the 21st of December, 1864, an order was made for winding up the company, and an official liquidator was appointed; and on the 11th of May, 1865, *T. J. Duckworth* was settled on the list of contributories in respect of the 100 shares. On the 21st of June, 1865, *T. J. Duckworth* executed a deed of assignment to trustees for the benefit of his creditors, which was duly registered in the office of the Chief Registrar of the Court of Bankruptcy, and a dividend of 5s. in

the pound was subsequently declared by the trustees. On the 7th of February, 1866, a call of £10 a share was made, and the official liquidator of the company now claimed £2000 to be due from *T. J. Duckworth* "in respect of calls and liabilities on his shares," and demanded £500 from the trustees of the deed out of the dividend declared. The trustees objected to pay this sum, claiming a right to set off the sum due to *Duckworth* from the company, and the official liquidator applied to the Court of Bankruptcy for an order on the trustees to pay the dividend. Mr. Commissioner *Winslow*, before whom the application was made, refused to make the order, and the official liquidator now appealed.

Mr. *Druce*, Q.C., and Mr. *Bagley*, for the official liquidator:—

We rely on *Grissell's Case* (1) as deciding that there is no set-off allowed in winding up. So also in *Smith, Fleming, & Co.'s Case* (2), and in *Anderson's Case* (3). Where the debts are not mutual there can be no set-off: *Forster* v. *Wilson* (4). *Duckworth* owes £2000 to the creditors of the company, and £5000 is due to him or his trustees from the company, and there can be no set-off.

Mr. *De Gex*, Q.C., and Mr. *R. Griffiths*, relied on 12 & 13 Vict. c. 106, s. 171, as making a difference in the case of bankruptcy. The liquidator represents the company, not the creditors, and only acts as representing the company.

Mr. *Druce*, in reply:—

The question is, which law is to govern, the law of 1849 or that of 1862? A contributory cannot claim a set-off, nor can his assignees or trustees, who merely represent him.

LORD CAIRNS, L.J.:—

The question raised in this case is of some nicety, and it is not surprising that it has attracted the consideration of the parties, after the decision in *Grissell's Case*. The difference between the cases is this:—Where there is no bankruptcy, the Court

(1) Law Rep. 1 Ch. 528, 535.
(2) Ibid. 538.
(3) Law Rep. 3 Eq. 337.
(4) 12 M. & W. 191.

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of Chancery, in winding up a company, has subject to its jurisdiction the liquidator, the contributories, the creditors, and the other shareholders, and the course which the Court of Chancery is to take is pointed out by the *Companies Act*, 1862. According to the true construction of that Act, the Court of Chancery is precluded from allowing the application of any set-off as between the liquidator and the persons who have to pay calls. That is the positive enactment of a statute made upon due consideration, the expediency of which is obvious; and such has been the decision of the Court.

In the case of a bankrupt contributory, very different considerations apply: the ordinary jurisdiction of the Court of Chancery does not extend into bankruptcy, and in the administration of a bankrupt's estate the Court of Bankruptcy must pursue the directions given by its own statutes. In the Act of 1849 (12 & 13 Vict. c. 106), the enactment of the 171st section is, that where there are mutual debts between the bankrupt and any other person, one debt or demand may be set off against another. Now, putting out of consideration the Act of 1862, would there not in this case be a set-off under this section? My opinion is, that there clearly would.

I do not forget Mr. *Bagley's* observation that the liquidator represents the creditors. No doubt he does, but only because he represents the company, and through the company the rights of the creditors are to be enforced.

Then why does the liquidator apply to the Court of Bankruptcy? In this case he has upon the list a person who has become bankrupt, or, rather, has executed a deed under which his estate is to be administered as in bankruptcy. The Act of 1862, sect. 95, gives the liquidator power to prove, rank, claim, and draw a dividend, in the matter of the bankruptcy of any contributory for any balance against the estate of such contributory, and so forth, but there is no attempt in that statute to administer the estate in bankruptcy, and authority is merely given to the liquidator to make his appearance in bankruptcy and claim such relief as the Court of Bankruptcy will give him. But, besides this, the words of that section afford a very strong indication that the statute of 1862 meant to adopt the law of 1849, for that which he is to prove and

receive dividends for is the balance against the estate of the contributory. Now, by whom, and in what Court, is that balance to be ascertained? Not in the Court of Chancery in winding-up, for that would compel the Court of Chancery to determine, in the absence of the assignees and of the creditors, what the balance was for which the proof is to be made. The obvious meaning is, that the liquidator is to go to the Court of Bankruptcy and prove for the balance which he is entitled to prove for, and that is after allowing set-off as provided for in the 171st section of the Act of 1849.

As Mr. *De Gex* said, in the case of no bankruptcy the decision in *Ex parte Grissell* may result in a way which will always be beneficial to the company, whilst in the case of a bankruptcy it may be the case that the application of the principle of sect. 171 may operate both ways, and be sometimes unfavourable to the company being wound up.

Whether this was sufficiently attended to in the preparation of the Act of 1862 is not for our consideration, and we must hold that there is nothing in the Act of 1862 to interfere with the provisions of the 171st section of the Act of 1849. The appeal must therefore be dismissed.

SIR G. J. TURNER, L.J.:—

I agree. It would appear improbable that the Legislature could have meant a set-off in bankruptcy when there would have been none if there was no bankruptcy. But the Legislature has expressly thrown the matter into the Court of Bankruptcy; by that Court, therefore, it must be decided, and the Act of 1849 will apply.

The appeal must be dismissed, but without costs.

Solicitors for the Appellant: Messrs. *Thomas & Hollams.*
Solicitors for the Respondent: Messrs. *Roy & Cartwright.*

L. C.
and L. JJ.

1867

May 29;
June 1, 17.

UNITED STATES OF AMERICA *v.* WAGNER.

Jurisdiction—Foreign State—Corporate Plaintiff—Pleading—Cross Bill—Discovery.

A foreign sovereign state adopting the republican form of government, and recognised by the government of Her Majesty, can sue in the Courts of Her Majesty in its own name so recognised.

Such a state is not bound to sue in the name of any officer of the government, or to join as co-Plaintiff any such officer on whom process may be served, and who may be called upon to give discovery upon a cross bill.

Per LORD CHANCELLOR and LORD CAIRNS, L.J.:—The Court may stay proceedings in the original suit, until the means of discovery are secured in the cross suit.

Colombian Government v. *Rothschild* (1) distinguished.

Order of *Wood*, V.C., reversed.

THE bill in this suit was filed by "The *United States of America*" as Plaintiffs, and alleged that in 1861 divers persons who owed allegiance to the Plaintiffs rose in rebellion, and formed a political organization under the style of the "Government of the *Confederate States*." That the so-called *Confederate States* possessed themselves of divers moneys, goods, ships, and treasure, the property of the Plaintiffs, and of other moneys and goods. That the Defendants were merchants at *Liverpool*, carrying on business under the style of *Fraser, Trenholm, & Co.* That certain cotton acquired as aforesaid by the so-called *Confederate States* had been consigned to the Defendants by persons who were, in fact, agents for the so-called *Confederate States*. That the Defendants were agents for the so-called *Confederate States* in *England*, and that large quantities of goods were so consigned to them. That in 1865 the said rebellion was suppressed, and the said political organization ceased to exist, and the several persons who had formed the so-called *Confederate States* had since submitted to the government of the Plaintiffs; and all the property held by the government of the so-called *Confederate States*, including all moneys, goods, and ships in the power of the Defendants, had vested in the Plaintiffs, and were now their absolute property. And the bill prayed that an

(1) 1 Sim. 94.

account might be taken of moneys, and goods, and ships, which had at any time come to the hands or power of the Defendants as agents as aforesaid, and that the Defendants might be ordered to pay to the Plaintiffs the moneys which, on taking such account, might be found to be in the hands or power of the Defendants, and to deliver up the goods and cotton in their hands as aforesaid.

To this bill the Defendants demurred generally, objecting that the bill ought to put forward the President of the *United States*, or some state officer, upon whom process might be served by the Defendants, and who might answer a cross bill. The demurrer was allowed by the Vice-Chancellor *Wood* on the 8th of March (1) and the Plaintiffs appealed.

Sir *Roundell Palmer*, Q.C., Mr. *G. M. Giffard*, Q.C., Mr. *Druce*, Q.C., and Mr. *Wickens*, for the Plaintiffs:—

The demurrer was allowed on the ground that the *United States*, being a republic, could not sue in their own name without joining as Plaintiff some public officer; but this proposition is unreasonable: *United States* v. *Prioleau* (2); *King of Two Sicilies* v. *Willcox* (3). A state can sue under the name by which it is recognised by the Queen, and the refusal to allow it would be a *casus belli*. We maintain that this bill is right in form. The ambassador could not sue: *Hullett* v. *King of Spain* (4). The right to discovery on a cross bill is a notion peculiar to Chancery, and in all the other Courts of this country the *United States* could certainly sue in the name under which the Queen treats with them: *Emperor of Austria* v. *Day* (5); *Story's* Equity Pleading (6). This is also the only proper form of bill, and it would be improper to join any one as Plaintiff: *King of Spain* v. *Machado* (7), and such a bill would, under the old practice, have been demurrable: *Schneider* v. *Lizardi* (8). The bill in *Colombian Government* v. *Rothschild* (9) was wrong, because there was no such state as the "Government of *Colombia*," for it was the "State of *Colombia*,"

(1) Law Rep. 3 Eq. 724.
(2) 2 H. & M. 559; Law Rep. 2 Eq. 659, 11 Jur. N.S. 792, 12 L.T. 724.
(3) 1 Sim. (N. S.) 301. 15 Jur. 215.
(4) 2 Bli. (N. S.) 31.
(5) 3 D. F. & J. 217, 7 Jur. N.S. 639.
(6) § 55.
(7) 4 Russ. 225.
(8) 9 Beav. 461.
(9) 1 Sim. 94.

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and, moreover, *Don José*, who was joined as Plaintiff, was an agent. Why should a republic be in a different position from that of a sovereign prince?

Mr. *W. M. James*, Q.C., Mr. *Kay*, Q.C., and Mr. *C. Hall*, for the Defendants:—

The case of *Colombian Government* v. *Rothschild* (1) decides that the person who is the executive is the proper person to sue; in a monarchy it is the monarch, in a republic, such as the *United States*, it is the President. Under the French Republic treaties were made with the First Consul: *City of Berne* v. *Bank of England* (2). In *France* a suit is now pending, instituted by *Andrew Johnson*, President of the *United States*, and in this Court there is a suit, *President of the United States* v. *Drummond* (3).

This is only a question of procedure, and is concluded by the case of *Colombian Government* v. *Rothschild*. Why did the Plaintiffs not add the name of one of their public officers? No doubt there are the cases of infants and lunatics from whom discovery cannot be obtained, and who are allowed to sue, but that is from the necessity of the case, and the rule does not apply here. The President ought to be the Plaintiff. The Plaintiffs only say that they are the *United States of America*, and allege that they are entitled to this property, but they do not bring themselves within the qualification established by the case of *Colombian Government* v. *Rothschild*.

Mr. *Benjamin*, with them:—

By the law of all countries the nation cannot sue, and the government only can sue, and this bill ought to be filed by *Andrew Johnson*, as President. He is the executive, and it is his duty to get in the public property, and for such purposes he represents the nation. Otherwise there might be several persons claiming

(1) 1 Sim. 94.

(2) 9 Ves. 347.

(3) 33 Beav. 449. The record in the Petition of *President of United States* v. *Drummond* was sent for by the Court. It assumed that *Smithson* left the *United States* a legacy for a charity. The suit was for administration, and the bill, as amended, stated an Act of Congress enabling the President to appoint an agent to prosecute the suit in this country, and, "in the name of *United States*, or otherwise," to receive the fund.

to represent a foreign country, and then what is this Court to do? It is a political question, and must be decided by the government of *England*, who must say who is the representative of the foreign country. No evidence is ever given on that point. The President has full power to claim the property of the state: *Kent's* Commentaries (1).

June 17. LORD CHELMSFORD, L.C.:—

The question raised by the demurrer to the bill in this case is whether the *United States of America* are entitled to institute a suit in their own name for an account of money and goods, alleged to be their property, and to have come to the hands and possession of the Defendants.

For the purposes of the demurrer the facts stated in the bill must be taken to be true, and the Court is bound to take judicial notice of the existence, and of the title, of the *United States of America* as a sovereign power, and also that the name by which the Plaintiffs sue is their correct and appropriate designation. The bill expressly alleges that the money and goods, the subjects of the suit, are vested in, and are the absolute property of, the Plaintiffs.

Upon the argument of the demurrer before Vice-Chancellor *Wood*, His Honour said:—"The question is not whether the Plaintiffs can sue, that is a right upon which there can be no doubt, and which has been recognised from the time of the case mentioned in *Rolle's* Abridgement (2), and finally established by the decision of the House of Lords in the *King of Spain's Case*, but how they can best sue, having regard to the consideration due from the Court to the interests of Her Majesty's subjects who may be sued." And founding himself "upon the great principles of moral justice expressed by Lord *Talbot* in *Wych* v. *Meal*" (3), and also relying upon the case of the *Colombian Government* v. *Rothschild* (4), he held that the *United States of America* must sue subject to all the consequences that any other sovereign state is subject to, "and that they must put forward some person who will

(1) Vol. i. p. 271.
(2) See Law Rep. 3 Eq. 729, *n.*
(3) 3 P. Wms. 311.
(4) 1 Sim. 94.

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be in a position to answer a cross bill, or give discovery, by that or other means," and he allowed the demurrer with leave to amend on payment of costs.

The argument before us in support of the demurrer has been chiefly rested upon the case of the *Colombian Government* v. *Rothschild*, and it has gone the length of maintaining that, by the rules of procedure in Chancery, a foreign republic is unable to institute a suit for the recovery of its own property in its own name. And being pressed to state in what manner the *United States of America* are to sue in our Courts, the counsel for the Defendants said the only proper mode was in the name of their President.

This, however, was not the view of the Vice-Chancellor *Wood*, for, upon the argument before him, it having been suggested that there would be no difficulty or disadvantage in compelling the *United States* to put forward the President, who, it was alleged, was in the position of a sovereign for the time being, the executive power being vested in him by the constitution, His Honour said:— "I am not holding, nor am I prepared to hold, that there can be a suit by him (the President) as representing the *United States*. He may not be the proper person to institute a suit on behalf of that country, and I should feel the same difficulty as I felt in the former case where he was made a Defendant to the suit." The Vice-Chancellor alluded to the case of *Prioleau* v. *United States and Andrew Johnson* (1), in which the *United States of America* having instituted a suit in their own name against *Prioleau* and others, *Prioleau* filed a cross bill for a discovery against the *United States* and President *Andrew Johnson*, His Honour, though he ordered the proceedings in the suit by the *United States* to be stayed until an answer was put in to the cross bill, yet expressly stated that the selection of the President as a Defendant in the cross bill was open to the objection that the Court could not take judicial notice, nor did he suppose it to be a matter of fact, that the *United States* Government have control over their President, or can compel him to produce papers, or the like, and therefore that he could not make any order that the proceedings in the original suit should be stayed until the President had put in his answer.

(1) Law Rep. 2 Eq. 659.

But if the President is not the proper person to sue on behalf of the *United States*, what other mode of prosecuting their rights in a foreign country than by suing in their own name, can be resorted to? I confess I have been unable to appreciate the distinction which ran through the whole of the Defendant's argument, between a suit in equity by the head of a monarchy, and a similar suit by a republican state. In a monarchy all the public rights and interests of the nation are vested in, and represented by, the monarch. In a republic they are the property of the state. When a foreign monarch sues in the Courts of this country it is not as the representative of his nation, but as the individual possessor of the rights which are the subject of the suit. Why should a republic be precluded from asserting in its own name, similar rights vested in it?

The Vice-Chancellor does not deny the right of the *United States* to sue, but says, "They must put forward some person who will be in a position to answer a cross bill, or give discovery by that or other means." I am quite at a loss to understand in what manner this is to be done, nor am I aware of any authority for saying that a party is disabled from suing because you cannot get discovery from him. The cases which were cited are far from establishing any such proposition. The case of *Wych* v. *Meal* (1) was a suit against the *East India Company*, and one of the officers of the company was made a Defendant, in order to discover some entries and orders in the books of the company. The officer demurred, shewing that it was not even pretended by the bill that he was in any way interested in the matter in question. Lord *Talbot* overruled the demurrer, saying, "Notwithstanding the answer of the Defendant, the officer, cannot be read against the company, yet it may be of use to direct the Plaintiff how to draw and pen his interrogatories, towards obtaining a better discovery; and no instance is produced where such a demurrer has been allowed, and it may be very mischievous and injurious to the subject by allowing thereof, to deprive them of that discovery to which, in common justice, they are entitled; and, on the other hand, no manner of inconvenience can ensue from obliging such officers of a company to answer." Reference was also made to

(1) 3 P. Wms. 311.

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Lord *Redesdale's* book on pleading (1), where, upon the subject of want of interest in the Defendant, after stating that unless a Defendant has some interest in the subject he may be examined as a witness, and, therefore, in general, cannot be compelled to answer a bill for a discovery, the passage proceeds, "There seems to be an exception to the rule in the case of a corporation, for, as a corporation can answer no otherwise than under their common seal, and, therefore, though they answer falsely, there is no remedy against them for perjury, it has been usual where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary, to make their secretary, or bookkeeper, or other officer, a party, and a demurrer, because the bill shewed no claim of interest in the Defendant, has been in such case overruled." And Lord *Eldon*, in *Dummer* v. *Corporation of Chippenham* (2), speaks to the same effect. Now, waiving the consideration of the correctness of the analogy which was supposed to exist between a corporation and a sovereign state, how do the authorities cited establish what the Defendants contend for? How can it be said that a series of decisions that a Plaintiff wanting a discovery may make the officers of a corporation Defendants without their being able to demur for want of interest, proves the proposition that no party can sue without affording the Defendant the means of obtaining a discovery? If this were the practice of the Court, it would follow, either that a republican state would be incapable of suing at all in its own name, or that it must join as co-Plaintiff some individual having a knowledge of the subject in dispute, contrary to the rule that no person should be joined as a Plaintiff who has not an apparent interest in the suit.

It was insisted that the case of the *Colombian Government* v. *Rothschild* (3), which was approved of by the House of Lords, had settled this question in Defendants' favour. That case, however, seems to have proceeded upon grounds which render it wholly inapplicable to the purpose for which it was cited. The bill was filed in the name of the government of the state of *Colombia*, and His Excellency, *Don Manuel José Hurtado*, described as a citizen of the said state, and minister plenipotentiary from the same to the Court of His Britannic Majesty, with the addition of his residence.

(1) 5th Ed. p. 223. (2) 14 Ves. 245, 252. (3) 1 Sim. 94.

It stated a decree by the Senate and House of Representatives of the state of *Colombia* for raising a loan upon the credit and service of the state, that *Arrubla* and *Montoya*, citizens of the state, were, under the decree, appointed Commissioners of the state for raising the loan; and that, for the purpose of raising such loan, an agreement was entered into between *Arrubla* and *Montoya*, on behalf of the government of *Colombia* of the one part, and Messrs. *B. A. Goldschmidt & Co.* of the other part, in which *Arrubla* and *Montoya*, as agents of the state, and by virtue of the decree and of the powers and authorities vested in them, bind the state and all the authorities thereof to performance. The bill prayed that an account might be taken of all sums received by *Goldschmidt & Co.* for and on account of the government of *Colombia*, and of all sums paid and expended by them unto or for the use of the government; and that what on the balance of such accounts should be due and owing from the firm might be paid to *Hurtado* as the representative of the Colombian Government. The bill having been demurred to, the Vice-Chancellor, Sir *John Leach*, allowed the demurrer, saying that a foreign state "must sue in a form which makes it possible for this Court to do justice to the Defendants. It must sue in the names of some public officers who are entitled to represent the interests of the state, and upon whom process can be served on the part of the Defendants, and who can be called upon to answer the cross bill of the Defendants. The general description of 'the Colombian Government,' precludes the Defendants from these just rights." Now I do not understand this to be a decision that the state of *Colombia* could not be Plaintiffs in a suit instituted for the recovery of the property of the state, much less that they could not sue unless they appointed some public officer, having himself no interest in the subject in litigation, to represent their rights. The Vice-Chancellor, by the words, "It must sue in the names of some public officers who are entitled to represent the interests of the state," must have referred to some persons or body in whom the interests of the state were vested, and who were, therefore, entitled to represent it in a suit.

There was nothing upon the face of the bill to indicate whether the government of *Colombia* was such a body, or, indeed, of whom

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it was composed, so that if the Defendants had been desirous of filing a cross bill, they would have been wholly unable, from information contained in the original bill, to know upon whom process should be served.

It was from the language of Sir *John Leach* in this case, that the Defendants' counsel thought themselves warranted in insisting that the *United States* could only sue in the name of their President. The opinion of Vice-Chancellor *Wood* (as already shewn) is against this method of proceeding. But we were referred to a case of *The President of the United States of America* v. *Drummond* (1), in which a suit was instituted in the name of the President for a legacy given to the *United States*. It does not appear that any objection was raised to the title of the President to sue. But he having been authorized by an Act of Congress to proceed to obtain the legacy, before the decree was pronounced the bill was ordered to be amended by introducing a statement of the authority by which the Plaintiff was qualified to sue, rendering this a case rather against than in favour of the Defendants.

I do not see what injustice can be done by permitting the *United States of America* to proceed in this case in their own name, without (to use the words of the Vice-Chancellor) "putting forward some person who will be in a position to answer a cross bill, or give discovery by that or other means." If the Defendant wishes to obtain a discovery, and files a cross bill for that purpose, he may apply to the *United States* to name some person from whom the discovery sought for may be obtained, and if they refuse to furnish him with this information, the Court will be justified in staying the proceedings in the suit until the Defendant's demand is complied with; and when the person who can give the requisite information is ascertained, the Plaintiffs in the cross suit may apply to the Court to amend their bill by adding the person named as a Defendant; and an answer will then be obtained in the same manner as where a corporation is sued and one of its officers is joined as a Defendant.

In this manner the right of the *United States of America* to sue in their own name will be maintained, and the Defendants will be furnished with all the means of discovery which they can require.

I am of opinion that the order of the Vice-Chancellor which is

(1) 33 Beav. 449.

appealed from should be discharged, the demurrer overruled, and the Defendants ordered to answer the bill.

SIR G. J. TURNER, L.J.:—

In my opinion, also, this demurrer ought to have been overruled. The right of a foreign state which has been recognised by Her Majesty, whether it be a monarchy or a republic, to sue in the Courts of this country for public property belonging to the state, has not been, and cannot be, denied. The very case which has been relied upon in support of this demurrer affirms the existence of that right, nor has it been, nor can it, upon the argument of this demurrer, be denied that the property sought by this bill to be recovered, is the public property of the republic of the *United States*, for the bill throughout alleges, and the demurrer of course admits this to be the case; and there is certainly nothing upon the face of the bill which leads to a different conclusion. This demurrer therefore, rests upon the very singular proposition that the Plaintiffs, although entitled to the property in question in the suit, and entitled to sue for it in the Courts of justice in this country, are not entitled so to sue for it by their own proper name and description.

Such a proposition would seem to require strong reasons, or great authority, to support it. It was argued in support of it, that this is simply a question of procedure; but, assuming it to be so, procedure is for the purpose of effectuating rights, and in determining questions arising upon it regard must be had to the rights to be effectuated. In this case, the rights to be effectuated are by the demurrer admitted to be in the Plaintiffs, and I do not see how they can be effectuated otherwise than in a suit by them; for I take it to be an inflexible rule of this Court, that suits can be brought only by the persons or bodies to whom the property in question belongs, or who have some right or interest in it. But then it was said that the suit must be so brought that the Court may be enabled to do justice to the Defendant, and that if the Plaintiffs be permitted to sue in their character of the *United States*, no cross bill could be effectually brought against them. It is however clear from the case of *Hullett* v. *King of Spain* (1), that a cross bill could be

(1) 2 Bli. (N. S.) 31.

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brought against them, and as to such a cross bill not being capable of being made effectual, there is not only the right which prevails in suits against corporations, of adding some proper person as a Defendant from whom a discovery can be had; but there is this other and far better right also, that it would be in the power of the Court to stay the proceedings in this suit, unless and until such discovery should be given as the justice of the case may require. It was ingeniously attempted, in the course of the argument on the part of the Respondents, to turn in their favour the cases which have been decided in this Court in suits by and against sovereigns. It was said that in those cases, the sovereign sued and was sued as the representative of the state, and that, by parity of reason, the Plaintiffs ought to sue by some person duly qualified to represent them; but this argument seems to me to rest upon a fallacy, and, when considered, to be against rather than in favour of the Respondents. In the cases referred to, the form of government was monarchical; and I take it that in such cases the public property of the state, so far as it is not by the constitution of the state otherwise destined, vests in the sovereign, subject to a moral obligation on his part to apply it for the benefit of his subjects; and when he sues in respect of the public property, he sues not as the mere representative of the state, but as the person in whom the property is vested for the benefit of the state. In the case of a republic the public property of the state remains in the state; and the state, therefore, and not any mere officer of the state, is the proper party to sue for it.

I will add only one further observation on this part of the case. There can, I think, be no doubt that an American corporation could sue in this Court in its corporate name for the recovery of property belonging to it; and it cannot surely be right that the state should be in a worse position than the body which it has created. So far, therefore, as the question depends upon the reason of the case, I can see no ground for supporting this demurrer. So far as authority is concerned, no case has been cited at the bar, nor have I met with any case which can in any way warrant the allowance of the demurrer, unless it be the case of *Colombian Government* v. *Rothschild* (1); and looking to the argument on which the judgment in that case proceeded, and to the concluding passage of

(1) 1 Sim. 94.

the judgment itself, I am quite satisfied that it was not intended by Sir *John Leach* to lay down any such rule as has been contended for on the part of the Respondents. I am of opinion, therefore, that this order ought to be reversed, and that there should be an order overruling the demurrer, with costs; but, of course, there will be no costs of the appeal.

LORD CAIRNS, L.J.:—

It is admitted that, upon the statements in the bill, it must be taken that the property claimed in the suit belongs to the *United States of America*, a foreign sovereign state, adopting the republican form of government, and recognised and treated with as such, and under that style, by Her Majesty; but it is contended that this foreign state, being a republic, cannot sue in its own name, and must either associate with it as Plaintiff, or proceed in the name of, the President of the Republic, or some other officer of state.

A proposition so startling, so grave in its consequences, and in such apparent antagonism to the rules, that the proper Plaintiff is to be sought in the owner of the subject matter of the suit, and that a foreign state is at liberty to sue in any of our Courts, would seem to require some argument and authority to support it. It was contended then, that when a monarch sues in our Courts, he sues as the representative of the state of which he is the sovereign; that the property claimed is looked upon as the property of the people or state; and that he is permitted to sue, not as for his own property, but as the head of the executive government of the state to which the property belongs; and it was contended, in like manner, that when the property belongs to a republic, the head of the executive, or in other words the President, ought to sue for it.

This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the government of Her Majesty, it is the sovereign, and not the state, or the subjects of the sovereign, that is recognised. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and

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not in a representative capacity, is the public property assumed by all other states, and by the Courts of other states, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that the diplomatic intercourse is conducted.

It was then contended that the republic of the *United States* as a body politic being Plaintiff, no effectual discovery could be had from it, or relief against it, on a cross bill; that it is a condition of obtaining relief in equity, that discovery may be had against the Plaintiff on a cross bill filed by the Defendant; and that in the case of a corporation, this right is preserved by the rule that its officers may be made co-Defendants for discovery.

It is to be observed, however, with regard to the case of a corporation, where the Court making an exception from its general rules allows persons who are merely witnesses to be made co-Defendants for discovery, that the exception does not depend on any reasons springing out of the nature of bills and cross bills; for the officers of a corporation may be sued with the corporation, even where no litigation has been commenced by the corporation; nor does the liability of the officers to discovery affect the question who is to be Plaintiff; for the corporation sues for the corporate property without joining any officer of the corporation as a co-Plaintiff.

The rule of the Court as to corporations, if it proves anything, would seem to shew that in a cross bill against the *United States* there would be a right to join some officer of the *United States* for the purpose of discovery. The Vice-Chancellor appears to have thought that the President of the *United States* was not an officer who could thus be joined as a Defendant, and I do not desire to express an opinion differing in that respect from the opinion of His Honour. But if the reference to suits against corporations does not establish a right to make some officer of the *United States* a co-Defendant to a cross bill, it is, as I think, altogether irrelevant. It is, however, in my opinion, an error to suppose that the right of a Plaintiff to sue depends in any way on the effectiveness of the discovery which on a cross bill can be exacted from him. From an infant, a lunatic, a representative, trustee, or executor, wholly

ignorant of the occurrences which are the subject of the suit, no practical discovery can be obtained, and yet they can maintain a suit. I apprehend that the only rule is, that the person, state, or corporation which has the interest must be the Plaintiff, and the Court will do the best the law admits of to secure to the Defendant such defensive discovery and relief as he may be entitled to. The Court can in all cases suspend relief on the original bill until justice is in this respect done to the Defendant.

The case of the *Colombian Government* v. *Rothschild* (1), however, was said to be, and the Vice-Chancellor appears to have considered that it was, a binding authority against a suit in this form. I cannot so view that case. The bill was filed in the name of the government of the state of *Colombia*, and if this bill had been filed in the name of the government of the *United States*, the case would have been analogous. Dealing with the words before him, Sir *John Leach* appears to me to have held, and to have most properly held, that an unknown and undefined body, such as the government of a state, could not sue by that quasi-corporate name, and the expressions in his judgment seem to me to intimate no more than that if the persons so described could sue at all they must come forward as individuals, and shew that they were entitled to represent their state.

Nothing could be more unreasonable than to suppose that by observations of this kind Sir *John Leach* meant to decide, and to decide for the first time, that a republic could not sue in its own name, but must have, or must create, some officer to maintain a suit on its behalf.

I think the demurrer in this case must be overruled.

Solicitors for the Plaintiffs: Messrs. *Sharpe, Parkers, & Jackson*, agents for Messrs. *Harvey & Co., Liverpool.*

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle*, agents for Messrs. *Hull & Co., Liverpool.*

(1) 1 Sim. 94.

L. JJ.
1867
April 18.

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION.

MARINO'S CASE.

Companies Act, 1862, s. 35—*Rectification of Register—Execution of Transfer by Transferee.*

I., a resident in *Smyrna*, who employed a company as his agents, directed them to buy shares in the company for him. On the 2nd of May they bought shares from *M.*, who executed a transfer to *I.* on the 4th, and left it at the company's office on the 7th. The next meeting of the directors was on the 10th; the company stopped payment on the 11th, and a winding-up Petition was presented on the 12th, on which an order was made. *I.* had signified to the company his approval of the purchase, but, being in *Smyrna*, had not executed the transfer, and it had not been registered. An order having been made for rectifying the register by removing the name of *M.*, it was proved on appeal, that although the articles of association did not prescribe any particular form of transfer, it had been the uniform practice of the company to have shares transferred by deed executed both by transferor and transferee:—

Held, that the directors were justified in not registering a transfer where the transfer deed had not been executed by the transferee; that there had therefore been no default or unnecessary delay by the company within the meaning of the *Companies Act*, 1862, s. 35; and that the name of *M.* could not be removed from the register.

THIS was a motion by the official liquidator of the *Imperial Mercantile Credit Association, Limited*, by way of appeal from a decision of Vice-Chancellor *Wood* removing the name of *Miltiades Marino* from the register of shareholders.

The company was registered in June, 1864, under articles which excluded Table A. to the *Companies Act*, 1862, and did not contain any provision defining the form of a transfer of shares, or requiring a transfer to be executed by the transferee. It was, however, shewn, on the appeal motion, though it had not appeared before the Vice-Chancellor, that the invariable practice of the company had been that shares should be transferred by deed executed by both transferor and transferee, and containing an agreement by the transferee to accept the shares. The form used was, in fact, identical with that given in Table A. to the *Companies Act*, 1862. Not a single transfer had ever been registered without the execution by the transferee.

Issaverdens, a resident in *Smyrna*, employed the company as his agents, and in April, 1866, he, by telegram, which he confirmed by letter through the next post, directed them to buy some shares for him in the company. The company wrote back to inform him that they had done so, and he replied approving of what they had done.

The fifty shares to which the present application related, were bought by the company from Mr. *Marino*, through Messrs. *Ionides & Barker*, brokers, on the 2nd of May, in pursuance of the above directions. On the 4th of May *Marino* executed a transfer, in the form above referred to, to *Issaverdens*, and gave it to *Ionides & Barker*, who, on the 7th, forwarded it to the office of the company.

The first meeting of directors after this was on the 10th of May. Another took place on the following day, at which it was determined that the company could not go on, and on the same day it stopped payment. On the 12th of May a winding-up Petition was presented, on which an order was subsequently made. The transfer had never been registered, nor, so far as it appeared, been laid before the directors; and the name of *Marino* remained on the register. He applied to have it removed. The Vice-Chancellor observed, that the articles in express terms excluded the operation of Table A., which contained a provision that transfers should be executed by the transferee, and did not themselves contain any analogous provision, and that no practice of the company to require such execution was shewn; and His Honour being of opinion that *Issaverdens* had clearly agreed to become a shareholder, held that there had been unnecessary delay in putting the name of *Issaverdens* on the register instead of that of *Marino*, and that the register ought to be rectified.

Mr. *G. M. Giffard*, Q.C., and Mr. *Lindley*, for the appeal motion:—

It is most important that the title to shares should be clearly evidenced, and the directors were perfectly justified in refusing to register a transfer not executed by the transferee. In fact, as it had been the uniform course of the company to require the transfers to be so executed, the directors would have failed in their duty if they had dispensed with it. The authority to purchase gave the company no authority to execute the transfer on behalf of *Issaverdens*, their duty was to send the transfer over to him for

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execution, and there was no time for that before the company stopped. It is therefore impossible to allege unnecessary delay within the meaning of sect. 35 of the Act.

Mr. *Druce*, Q.C., and Mr. *Marten*, for *Marino* :—

Issaverdens was bound to take these shares, and the company had in their possession abundant proof of this. They ought, therefore, to have registered him at once, and they were guilty of unnecessary delay in not doing so. They acted on his directions to purchase; can they then turn round and say that they have not sufficient evidence that he was bound to become a shareholder? Execution by the transferee was not required by the articles, it was nothing but a practice from which the directors could depart when they pleased; and even if it is to be treated as a rule of the company that the transferee should execute the transfer, the omission of a formality is not fatal: *Straffon's Executors' Case* (1).

SIR G. J. TURNER, L.J. :—

5 Eq 205. We think it unnecessary to call for a reply in this case. The matter now stands upon an entirely different footing from that on which it stood before the Vice-Chancellor; there being evidence before us that it was the unvarying course of this company not to act upon the transfers of shares when brought in for registration, unless they had been executed by the transferees.

The case, therefore, really stands thus: the Respondent has to make out that the company was guilty of default in not taking his name off the register, although, according to their ordinary practice, his name could not be taken off except upon production of a deed, executed not only by himself as the transferor of the shares, but by the person to whom he transferred them. It would be a very strong and very dangerous decision to hold that the company were bound to deviate from the practice which they had always pursued, without any sufficient reason being laid before them to induce that deviation, and, upon that ground alone, I think we should be justified in differing from the opinion of the Vice-Chancellor, which probably would not have been the same had the facts which we have before us been before him.

(1) 1 D. M. & G. 576.

Independently, however, of that particular ground, there are considerations in this case which would have rendered it difficult for me to agree in the conclusion at which the Vice-Chancellor has arrived. The company here filled a double character, being agents for *Issaverdens*, the purchaser of these shares, and owing a duty to him as such agents, and at the same time owing a duty to their shareholders. Now it is necessary, in disposing of a case in which that species of complication arises, to distinguish carefully between the duties which the company had as agents for the purchaser, and the duties which they owed to their shareholders. I take it that their duty, as acting on behalf of their shareholders, could not begin until their duty as agents for the purchaser had been completed. Now what was the duty of the company as agents for the purchaser? They received, as agents for him, an assignment of the shares by a deed which was evidently intended to be executed both by the transferor and the transferee, and by the terms of which the transferee accepts the shares subject to the several conditions on which the transferor held the same immediately before the execution thereof. Seeing that deed, it was the duty of the company, as agents for the purchaser, to take care that their principal performed his duty to his vendor, and not only received the benefits which were given to him, but rendered himself liable to the obligations which this deed was intended to impose upon him. That could not be done, as I conceive, without the execution of the transfer by the purchaser. It could not have been done by the mere fact of the purchaser being put upon the register, because if he were put upon the register without his having executed the deed, he might at some future time dispute his having given authority to place his name there, and ask to have it removed, and so expose the vendor to future liability in respect of the shares. Upon that ground, therefore, even apart from the consideration to which I have before adverted, as to the practice which had been pursued by the company, I am rather disposed to think that *Marino* must continue upon the register, and seek his remedy, if remedy he has, against *Issaverdens*.

I think, therefore, that the order of the Vice-Chancellor must be discharged, and *Marino* put upon the list.

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LORD CAIRNS, L.J.:—

The facts of this case, as we have them now before us, enable us, I think, much more safely to arrive at a conclusion than the facts which were before the Vice-Chancellor, who does not appear to have had before him any evidence as to what was the practice of the company with regard to the transfer of shares.

The transfer executed by the Respondent, *Marino*, purports to be a transfer by him to *Issaverdens*, described upon the face of the transfer as of *Smyrna*, of certain shares in the company, and, on the other hand, *Issaverdens* is made to agree to accept and take the shares subject to the conditions on which they were held. It is a form of transfer, therefore, which, *ex facie*, is not complete until it is executed by the transferee — it is intended to be executed by the transferee—and is so far incomplete until it is executed by him. It appears that the sale was negotiated through the medium of Messrs. *Ionides & Barker*, brokers, who of course must have been known by *Marino* to be acting as agents for some third party; it does not appear whether *Marino's* belief was that they were acting directly for *Issaverdens*, or that they were acting for some other person who was an agent for *Issaverdens*. The transfer, however, was executed by *Marino*, and given by him to Messrs. *Ionides & Barker*.

Now, the motion was founded upon the 35th section of the Act of 1862, and the *onus* which *Marino*, the party moving, had to discharge was to shew that on the part of the company there had been default or unnecessary delay in entering on the register the fact of his having ceased to be a member of the company. The default or the unnecessary delay, if there were default or delay, lies in a narrow compass of time, because the transfer reached the office of the company on the 7th of May, 1866; on the 11th of May, four days afterwards, the company suspended its operations, and on the 12th of May the Petition was presented to wind up the company. The dates, therefore, between which we have to examine into the question are the 7th of May, on the one hand, and the 12th of May, at the utmost, on the other hand. Now, the practice of the company with regard to its transfers is in evidence before us. It is true that there is no regulation in the articles

with regard to the form of the transfers, or as to how they should be executed; and the company did not act under the articles called "Table A." scheduled to the Act of 1862, amongst which articles there is one which prescribes that the transfer shall be executed by the transferor and the transferee, but the practice of the company, from its foundation, had been that such transfers as were accepted and registered by it were transfers executed by both transferor and transferee. So far, therefore, as the practice of the company could make the law or the rule of the company, the law and the rule would be that the transfer should be executed by both parties to it. That being so, the first question it seems to me which we have to ask is, what was the duty of the executive of the company with regard to its own shareholders; and measuring that duty according to the standard prescribed by the practice of the company, it appears to me that the answer should be this, that their duty was certainly, as a general rule, not to accept a transfer or to register it until it had been executed by both parties to it; and I should also add, that in this particular case *Marino* appears himself to have been a party assenting to that view of their duty, because, as I have already stated, the transfer which he executed was a transfer *ex facie* appearing to require execution also by the transferee. The consequences to the company of any neglect of duty by the directors in this respect are of course manifest. Upon any proceeding in which it would be necessary to prove that the incoming shareholder had assented to become a member of the company, the burden of proof would lie upon the company. If he had executed the transfer, the proof of course would be complete upon the production of the transfer. If the transfer were produced unexecuted, the proof must be furnished *aliunde*. How would it be furnished? It is said there might be letters, or telegrams, or other dealings, between the incoming shareholder and the company, testifying his assent to become a member of the company. That is very true; but then is it supposed that letters or telegrams could be registered along with the transfer, and yet the directors, unless they could register along with the transfer the evidence that the incoming shareholder had agreed to be a shareholder, would not have performed the duty of having preserved a record of the consent of the incoming share-

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holder to be a shareholder. I may observe that the consequence of neglect of duty in this respect may be very well illustrated in the present case, for it appears that several letters and telegrams, which would have more or less bearing upon the question whether *Issaverdens* had assented to become a shareholder in the company, appear to have been lost, which is what might happen in many cases if such a course of business were pursued.

It is another peculiarity in this case that it cannot be predicated with certainty in what character the transfer of these shares unexecuted by the transferee was sent to the company. The clerk of Messrs. *Ionides & Barker* simply says, having received a commission to purchase the shares, and having got the transfer executed by the transferor, he sent it to the company who had commissioned him to make that purchase. Whether it was sent to the company for the purpose of registration, or whether it was sent to them as agents of *Issaverdens* to have the transfer executed by *Issaverdens*, or whether, as, perhaps, was the more just conclusion, it was sent to them for both those objects, is not stated. I assume, and perhaps it is the safer course to assume, that it must be taken to have been sent to them for both those objects.

Then comes the question, what was the first duty to be performed by the company? It appears to me clear beyond all doubt that the first duty of the directors was to obtain the completion of that which their principal, *Issaverdens*, was bound to do, and, as my learned brother has stated, their obligation as the custodians of the register did not arise until they had first performed their duty as the agents of *Issaverdens*, and had handed to him, or sent to him, the document which he was intended to execute, unless they were themselves provided with a power of attorney enabling them to execute the deed as his attorneys. Their failure to do that would, as I have already pointed out, entail inconvenience, if not loss, to the company. Their failure to do it might also occasion possible inconvenience and risk to the vendor, because it might become a question afterwards as between the vendor and the company, or between the vendor and *Issaverdens*, whether Mr. *Issaverdens* had or had not consented to undertake the liabilities which previously rested upon the vendor.

Now, to my mind it by no means appears clear that the com-

pany did not intend to discharge this duty, namely, the duty of obtaining the execution by Mr. *Issaverdens*, because, so far as we find upon the evidence, it does not appear that this transfer, left at the office of the company on the 7th, was submitted to the meeting of the directors on the 10th. It is, perhaps, dangerous to speculate upon reasons where we have no evidence upon the point. The circumstance that it was not laid before the meeting of directors may have arisen from carelessness, or from pressure of other business, but it may also have arisen from the company and the officers of the company knowing that until the execution by *Issaverdens* was obtained, the time had not arrived for laying it before the meeting of the directors, and it may well be that the intention was to send it to *Issaverdens* to procure his execution, and after that was done to present it to the directors in order that it might be passed. At all events, in my opinion, that would have been the duty of the directors, and certainly it seems to me that no complaint can be made against them for not having done what, according to my view, it was their duty not to do until *Issaverdens* had executed the transfer.

There is another view of the case which is, perhaps, only the converse of that which we are now trying, but presents it in a way which may be useful as an illustration. Suppose this company had been at this time a prosperous company, and profits accruing, and dividends being paid, could *Issaverdens*, under the 35th section, have come forward and complained of the company having been guilty of default or unnecessary delay in not immediately putting him upon the register when they received this transfer unexecuted by him, and could he complain of their waiting in order to send out the transfer to him to be executed before they put his name upon the register? In my opinion, certainly, any complaint of that kind coming from him would be entirely unfounded. So likewise, although the circumstances are the reverse, and the object of *Marino*, the vendor, is to be removed from the register, the same observation, I think, applies to his case. He is suffering a misfortune arising from his dealing with a vendee who was out of the country, and could not execute the deed. It is a misfortune, and not any default or unnecessary delay on the part of the company, which has led to *Marino's* continuing on the

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register. I think that his application was unfounded, and ought to have been dismissed by the Vice-Chancellor.

Solicitors for the Official Liquidator: Messrs. *Ashurst, Morris, & Co.*

Solicitors for Mr. *Marino*: Messrs. *Thomas & Hollams.*

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May 27; June 6.

In re REESE RIVER SILVER MINING COMPANY.

SMITH'S CASE.

Misrepresentation—Prospectus—Shareholder—Delay.

S., on the day of registration of a company for working mines in *N.*, received a prospectus issued by the company which stated that they had agreed to purchase a property in *N.*, containing valuable claims, some of which were in full operation, and making large daily returns. *S.*, on the faith of this, took shares, and was registered as shareholder on the 2nd of August, 1865. On the 30th of December, 1865, up to which time he had heard nothing to throw doubt on the prospectus, he received a report from the company shewing that the company had found the property worthless, and had agreed to purchase another instead, and promising a detailed report in a short time. On the 19th of January, 1866, *S.* received the detailed report, shewing that the property was worthless, and that the workings on it had been abandoned before the prospectus was issued. The directors, as it appeared, had issued the prospectus on the faith of the representations of the vendor of the property, and without knowing of their untruth. On the 6th of February, 1866, *S.* filed a bill to be relieved from his shares. On the 28th of May, 1866, a winding-up order was made, and *S.*, who had been refused leave to prosecute the suit, applied under the winding-up to have his name removed from the list of contributories:—

Held, in accordance with the opinion of the Master of the Rolls, that *S.* had not been guilty of laches, for that the report received on the 19th of January, did not shew the representations in the prospectus to have been untrue at the time when it was issued, and that *S.* was therefore right in waiting for further information before he took proceedings to get rid of his shares:—

Held, reversing the decision of the Master of the Rolls, that *S.* was entitled to have his name removed from the list of contributories.

THIS was a motion by way of appeal from an order of the Master of the Rolls refusing to remove the name of Mr. *Smith* from the list of contributories of the *Reese River Silver Mining Company, Limited.*

The company was registered on the 5th of June, 1865, as a limited company, with a capital of £100,000 in 20,000 shares of £5 each, for the purpose of carrying on the business of mining. On the day of registration, Mr. *Smith* received from the promoters a prospectus stating the objects of the company, and referring to a mining property in *Nevada*, which the company had contracted to purchase from a Mr. *Jones*, as to which the prospectus contained the following statements:—

"The property which this company has contracted for consists of about fifty acres of land, containing several very valuable claims, some of which are in full operation, and making large daily returns." "The proprietor, who has amassed a large fortune during the last eighteen months by working a few of the claims upon the property agreed to be transferred to this company, has, to shew his confidence in the prosperity of the company, agreed to receive the purchase-money in fully paid-up shares only, and to deposit them with the directors as a guarantee for the mines until returns are made enough to pay interest at the rate of £25 per cent. per annum, before which his shares are not to participate in any dividend whatever."

Mr. *Smith*, on the faith of this prospectus, applied for 100 shares, and paid a deposit of £100. The shares were allotted to him; he paid the further sum of £1 per share which was required on allotment, and was registered as the holder on the 2nd of August, 1865.

Shortly after the allotment of the shares, Messrs. *Johns* and *Aaris*, two of the directors, were sent out as a deputation to *Nevada* to inspect the property contracted to be purchased, with power to enter into arrangements, if thought desirable, for the purchase of other property. On the 30th of December, 1865, Mr. *Smith* received notice of a call of £1 per share, to be paid on or before the 24th of January, 1866. On the same 30th of December he also received the following letter, signed by the chairman of the company:—

"With the acquiescence of my brother directors I have much pleasure in submitting to you a copy of a most satisfactory letter received this day from our deputation at *San Francisco* on their

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return from the mines at *Reese River*. It will be observed that we are to expect very soon an elaborate report from Messrs. *Cummings, Cherry, & Son*, most influential mining engineers of *New York*, a member of which firm accompanied our deputation, of which we will also send a copy when we receive it; and on the return of our deputation to *England* all further information shall be as promptly afforded as possible. It is hardly necessary to say that the call, of which you receive notice, has been made on account of the necessary undertaking of the deputation."

The letter of the deputation contained this passage:—"Our expectations regarding the property belonging to Mr. *Jones* we found correct: it was almost valueless; but as we then knew that other mines which have a first-rate character could be purchased at a far lower figure, this was a matter of rejoicing." The letter went on to say that they had purchased one of the best mines in the district for 36,000 dollars, and recommended the making a call to pay the purchase-money.

On the 19th of January, 1866, Mr. *Smith* received a letter from the chairman of the company, which was in part as follows:—

"After a few days we shall be able to send you a copy of the engineer's report before alluded to, also one from the deputation. The engineer's is a very minute and satisfactory document. Messrs. *Johns* and *Aaris* found the property contracted for not only inferior to the representations made, but actually worthless; therefore, at the recommendation of the engineer, they purchased at a very low figure a most valuable mine called the *Confidence Extension*."

The report of the deputation was in fact sent at the same time. After referring to the frauds which had been committed by the sale of worthless or non-existent mines, and mentioning the sale by *Jones* to the company as one of them, the report stated as follows:—

"We found the property contracted for by the company situated on the slope of a hill, where its own and all other workings had been abandoned months ago."

Mr. *Smith* refused to pay the call made on the 30th of Decem-

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ber, and on the 6th of February, 1866, filed his bill against the company to be relieved from his shares, and to restrain the company from suing him at law for the call. The Plaintiff deposed, and his evidence was uncontradicted, that until the 30th of December he knew nothing about a deputation having been sent out, and had no information whatever to lead him to doubt the accuracy of the statements in the prospectus respecting the mine contracted to be purchased. It did not appear that the directors, when they issued the prospectus, were aware that these statements were untrue; but it appeared from their own evidence that they had no other authority for making them than the representations of the vendor, and that they considered it necessary to send out a deputation to test their accuracy before the purchase was completed and possession taken.

On the 20th of April, 1866, Vice-Chancellor *Wood*, on motion, granted an injunction to restrain proceedings at law for the call against the Plaintiff (1). On the 27th, a Petition to wind-up the company was presented, and on the 28th of May a winding-up order was made. Mr. *Smith* applied for leave to go on with his suit, which was refused, and he then applied to have his name removed from the list of contributories, which application, on the 14th of March, 1867, was refused by the Master of the Rolls, who considered that Mr. *Smith* had not been guilty of improper delay, but that the misrepresentations were not of such a nature as to entitle him to relief, and that the decision of Vice-Chancellor *Wood*, being made on an interlocutory application while the company was a going concern, did not decide the present question. (2 W. R. 166)

Mr. *Cotton*, Q.C., and Mr. *Eddis*, for the Appellant:—

Mr. *Smith* was induced to take his shares by a material misrepresentation made to him by the company, and he is entitled to be relieved: *Central Railway Company of Venezuela* v. *Kisch* (2); *Ayre's Case* (3). That the directors did not know the representation to be untrue is of no importance, since they made it positively without any reference to their information or belief: *Rawlins* v. *Wickham* (4). There was no undue delay. The applicant took

(1) Law Rep. 2 Eq. 264; 12 Jur. N. S. 616.
(2) Ibid. 2 H. L. 99.
(3) 25 Beav. 513. 4 Jur. N. S. 596.
(4) 3 De G. & J. 304; 5 Jur. N. S. 270.

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steps as soon as he had information shewing that the representation was at the time it was made manifestly contrary to the facts as then existing. The right of Mr. *Smith* to be relieved from his shares cannot be affected by the winding-up order, the effect of such an order being to fix the rights of the parties in the position in which they stand when it is made.

Mr. *Selwyn*, Q.C., and Mr. *Graham Hastings*, for the official liquidator:—

We do not represent the directors but the body of creditors and shareholders, many of whom may have been induced to assume their present positions by seeing Mr. *Smith's* name on the register. The onus of proof thus is shifted, since the case is no longer between Mr. *Smith* and the persons who are alleged to have deceived him. *Ex parte Oakes and Peek* (1) shews that a shareholder may not escape in a winding up, where he might in a going concern. *Henderson* v. *Royal British Bank* (2) proceeds on the same principle. The parties cannot be replaced in *statu quo*. But we say that there was not any misrepresentation such as to avoid the contract. The applicant must have been perfectly aware that the directors were only making statements to the best of their information and belief, and not of their own knowledge, as to mines in *California*. Moreover, it is not shewn that there was any misrepresentation at all. The deputation, as it appears on their cross-examination, never saw the mine, so that there is no legal evidence that it is worthless. Supposing it was, there is not enough to avoid the contract, for the company was not formed to work this particular mine. Delay is most material, especially in cases relating to mining property, and the Appellant has been guilty of such delay as to disentitle him to relief: *Lawrence's Case* (3).

SIR G. J. TURNER, L.J.:—

This is a motion to discharge an order of the Master of the Rolls, refusing an application to take the name of Mr. *Joseph Mackrill Smith* off the list of contributories, on the ground of his having been induced by misrepresentation to take shares in the company.

(1) Law Rep. 3 Eq. 576. (2) 7 E. & B. 356,

(3) Law Rep. 2 Ch. 412.

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It is very satisfactory, after the numerous cases of this description which have been before the Court, to find that the law applicable to them has, to a considerable extent, undergone the consideration of the House of Lords in the case of *Central Railway Company of Venezuela* v. *Kisch* (1), the judgment in which throws very clear light upon the principles which are to be applied to the decision of these cases. As I understand that case, if it can be shewn that a material representation which is not true is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the Courts are bound to relieve him from it, and to take his name off any list of shareholders or contributories on which it may have been put. The case, I think, goes to that extent, according to the opinion which was expressed by Lord *Romilly* himself, "that contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals."

The question, therefore, in the present case must be, was there or was there not here a material representation which was not true contained in any document issued by the company, which led to Mr. *Smith* becoming a shareholder? I speak of a material representation so made that it must be treated as a representation made to him by the company, because, of course, in all these cases the question arises, by whom the representation was made. If a man goes into the market and buys on a representation made to him by the seller, that may be an entirely different case from one in which a man takes shares on a representation made to him by the company, and nothing that I say in the present case is intended to have any reference to a case of the former description. Now the prospectus of this company contains this statement:—"The property which this company has contracted for consists of about fifty acres of land, containing several very valuable claims, some of which are in full operation, and making large daily returns." Again, "The success which has attended all the local companies, as also private individuals working the silver ores on all sides of

(1) Law Rep. 2 H. L. 99.

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these mines, is verified by official documents, and the proprietor (who has amassed a large fortune during the last eighteen months by working a few of the claims upon the property contracted to be transferred to this company) has, to shew his confidence in the prosperity of the company, agreed to receive the purchase-money in fully paid shares." Here there is a distinct representation of a purchase made by the company of fifty acres of land, containing several very valuable claims, some of which are in full operation, and making large daily returns. Now, in the first place, was or was not that representation material? Nobody can doubt that any one who was thinking of taking shares in this company would be very much influenced by the consideration that the mines upon the property which the company had purchased were in full operation, and making large daily returns. In the next place, was or was not that representation true? We have it from the statements made by the company themselves, as I understand those statements, that that representation was wholly untrue. The company appear to have sent out two of their directors to examine the property, and, on the 17th of November, 1865, those directors wrote (I presume to the directors in *England*), a letter containing this statement, with reference to the purchased property, "Our anticipations regarding the property belonging to Mr. *Jones* we found correct, it was almost valueless." After which they go on to say that as they knew there were other mines which could be purchased at a far lower figure, this was a matter for rejoicing. That letter having been sent to the Plaintiff by the company on the 30th of December, 1865, we have a subsequent letter received by the Plaintiff from the company on the 19th of January, 1866, which contains this statement: "The engineer's is a very minute and satisfactory document. Messrs. *Johns* and *Aaris* found the property contracted for not only inferior to the representations made, but actually worthless," and in the report of Messrs. *Johns* and *Aaris*, we find this: "We found the property contracted for by the company situated on the slope of a hill, where its own and all other workings had been abandoned months ago." We have therefore, in these reports, which were forwarded by the board of directors to Mr. *Smith*, a distinct and clear contradiction of the statement contained in the prospectus, that the mines on the pro-

perty were in full operation, and making large daily returns. Then the fact of the representation being made, and the materiality of that representation, and the fact that the representation was not well founded, being established, the case scarcely seems to me, after the decision of the House of Lords in the case of *Central Railway Company of Venezuela* v. *Kisch* (1) to admit of any doubt. The first argument urged on behalf of the official liquidator was, that the representation in the prospectus was not proved to be false; but in my opinion the report of the 19th of January, 1866, is quite sufficient ground for saying that it is proved untrue. Then it was said that the representation ought not to be considered as the foundation of the contract, inasmuch as the company was formed not merely for working the particular mines which were purchased. But it is clear that this was a representation which, whether the company was confined to this one mine or not, was a representation necessarily inducing and influencing the contract. Then it was said that the directors, when this representation was made, were as much deceived as the Appellant himself, and that he ought not to be relieved, for that he must have understood the representation to have been made by the directors upon mere report. But if a company will take upon itself to assume the authenticity of, and give credit to, the reports which are made to it, and represent as facts the matters stated in those reports, it must take the consequences. If the company had confined themselves to saying, "We have received reports from which we believe, and have reason to believe, that these mines are in full operation, and are making daily large returns," it might, and no doubt would, have been very difficult for Mr. *Smith* to be relieved from the contract, but the company, instead of thus referring to the information received, stated the circumstances as facts. I cannot say that Mr. *Smith* was not entitled to believe the assertion so made by them, and I think that they cannot be excused because they assumed as true the representations which had been made to them. I think that the case of *Rawlins* v. *Wickham* (2), referred to in the course of the argument, is decisive on that point. Mr. *Selwyn*, in the course of the argument, put a case of forged deeds, and a representation made upon the strength of

(1) Law Rep. 2 H. L. 99. (2) 3 De G. & J. 304; 5 Jur. N.S. 270

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them. The answer to that point is this, that the deeds would constitute a foundation for the statement, whereas here the statement which was made was without any foundation, except the representation made to the directors, which representation they took upon themselves to repeat to the public as being true.

I think that the reasons which I have stated are sufficient to dispose of the question on the substantial point, but then it is said that there has been such delay on the part of Mr. *Smith*, that he ought not to be relieved from the contract. Now certainly of late this Court has laid very great stress on the necessity for parties coming here within a reasonable time in cases of this description, and I am not disposed to cast any doubt upon that principle. I think that parties who are in the position of shareholders in companies, if they come to this Court to be relieved from their shares, on the ground of fraud practised upon them, must come with promptitude. But how does this case stand in that respect? The Plaintiff, I call him the Plaintiff because he has filed a bill, had notice on the 30th of December, 1865, that the property which the company had contracted to purchase was almost valueless. But the directors, in the letter which gave this notice, said that they expected in a few days to have a very elaborate report upon the subject, and Mr. *Smith* received this subsequent report from the directors on the 19th of January, 1866. On the 6th of February he filed his bill. Now if time were to be taken as running against him from the 30th of December, 1865, he possibly might be considered to have come too late. But I think improper delay cannot be imputed to him for not having filed his bill immediately after he received the letter of the 30th of December, 1865, and for this reason, that although that letter, or, rather, the enclosure in that letter, stated that the property was almost valueless, it said nothing as to what the state of the property had been, and therefore it might well be, that though when the two directors got out to the country, they found the mine was valueless, it might have been a producing valuable mine at the time when the prospectus was issued; and I think he would not have been justified in filing his bill on the information which he had then received. It was not until the second report, which was received by him on the 19th of January, 1866, that the state of

the property at the time when the purchase was made was made apparent to him by the statement that the workings had been abandoned for months. I think, therefore, that this is not a case in which time can be reckoned against Mr. *Smith* as from the 30th of December, 1865, but that it must be reckoned only from the 19th of January, 1866, within three weeks after which time the bill was filed. It may be right to observe that in the case of *Central Railway Company of Venezuela* v. *Kisch* (1), relief was given by the House of Lords, notwithstanding there had been a delay of two months after full information that the fraud had been practised. With all respect to the decision of the Master of the Rolls it seems to me that this order cannot be sustained, that Mr. *Smith* should be relieved from the contract, and his name taken off the list of contributories.

LORD CAIRNS, L.J.:—

I entirely agree with the Master of the Rolls in the view which he has expressed, that if the Appellant in this case is on other grounds entitled to have his name taken off the list of contributories, he is not debarred from that relief by laches. The case, as it seems to me, must be viewed as if it were to be decided on the 6th of February, 1866, on which day the Appellant filed his bill. He received, on the 30th of December, a statement with regard to the mine in question which might well excite his surprise and dissatisfaction, but the same document in which that information was conveyed to him informed him that an elaborate report from engineers who had accompanied the deputation to the district was soon to arrive, and that on the return of the deputation all further information should be as promptly afforded as possible. I agree with the Master of the Rolls, that if in that state of things he had immediately filed his bill, without waiting for the report or for the return of the deputation, he might well have been charged with precipitation. The further information so promised was communicated to him on the 19th of January, and then, as my learned brother has remarked, he heard also for the first time the further statement that not merely was this mine worthless as it stood, but

(1) Law Rep. 2 H. L. 99.

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that all the workings in it had been abandoned for months previous to the time when the deputation had arrived at the district. That information he received on the 19th of January, and upon the 6th of February his bill was upon the file. I desire to adhere to everything which has been said by myself and by others as to the necessity for promptitude on the part of any person who desires to repudiate a contract of this kind, but I am unable to see that the time which elapsed between the two dates that I have mentioned shews any lack of promptitude.

The question of delay, then, being out of the case, the next question is, was the representation in the prospectus which has been referred to, and which I will not read again, with regard to this mine, and the workings of it, a material representation with reference to the contract? It is very true, as has been said, that it is a representation with regard to one mine only, and not with regard to other mining speculations in which the company might be engaged, but it is a representation with regard to the only property which at the time when the prospectus was issued they had contracted for, and it is, in my opinion, held out to any one reading the prospectus as the main inducement for persons to take shares in the company. Every word that is said with regard to the mine is, to my mind, material in inducing any person to take shares in the company, and it is, as I think, the more material, because these mines were not mines in this country, where, probably, independent inquiry would be made, and inspection might take place, on the part of those who desired to become partners in the transaction, but were mines at such a distance that any person taking shares was obliged to rely on the statements made in the prospectus with regard to them. Then, were the representations untrue? That seems to me to be admitted, because I find that before the winding-up of the company, when the company was being carried on as a going concern, when a call was being made, and a meeting of the company called to consider the report of the deputation, the executive of the company, after conference with the deputation, were content to make the statement upon the information then obtained, that the mines were worthless, and to repeat the statement that the workings had been abandoned months before the deputation had gone to that part of the

country. It seems to me that after that it is quite in vain to enter into any inquiry now whether the deputation had more or less with their own eyes seen the state of affairs abroad. They had informed themselves sufficiently to enable them to make a representation of that to their employers, and their employers were satisfied to repeat that representation to the shareholders in the company, and from that admission as to the state of the mine it seems to me neither the company nor the official liquidator can now withdraw. The representation in the prospectus being untrue in point of fact, it seems to me perfectly immaterial whether the directors, when they made it, believed it to be true, or did not believe it to be true. That might be material with reference to proceedings of a different kind instituted against the directors, with a view to obtain damages from them personally; but for the purpose of this investigation I think it must be taken that they repeated the statement as one the truth of which they were content to vouch for. If they had been content to say, "We ourselves know nothing about the state of the mine, but we have been told it is a very valuable mine largely worked at present;" and if they had, in point of fact, been so told, no person could have complained of the prospectus as calculated to mislead; but in place of repeating as hearsay what they had been told, they affirm it as a positive fact, and apparently, according to the terms of the prospectus, as a fact within their own knowledge.

I am bound also to say, that now we have the whole statement of the directors before us, it is impossible to suppose that they had any reasonable ground for believing the statement which they made. No men of ordinary understanding, if they only had bestowed reflection upon that in which they were dealing, could have felt themselves justified in believing a statement of this kind on the mere assertion of the person who was desirous of selling the property to Mr. *Aaris*.

Then we were very much pressed with this, that although what I have referred to might give a perfect equity as between Mr. *Smith* and the directors, or between Mr. *Smith* and the company, to have his name taken off the list, there had supervened or intervened the rights of creditors, and that in consequence of the rights of creditors, Mr. *Smith* ought to be deprived of the relief

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which otherwise he might have obtained. Now, I apprehend there can be no doubt that in any case where a contract is made between an individual engaged in trade and a person who advances money or goods to him, or where an individual is a member of a company which has entered into such a contract, being a company unincorporated, or a company whose shareholders are liable directly to creditors, it would be no defence for the individual to say to the creditor, in answer to his demand, "I have been induced to engage in this trade, or to take shares in this company, by the fraud and misrepresentation of third persons." That would be no answer, for this simple reason, that there is in either of the above cases a direct contract between the individual and the creditor, untainted by fraud or misrepresentation. It would be no answer to an action on one contract to say that another contract has been made founded on fraud. There is, however, with regard to companies established under the Act of 1862, no contract whatever between a creditor of the company and a shareholder in the company. The contract is between the creditor and the company. When the Legislature introduced the principle of limited liability it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors or third persons could contract. There is no doubt that creditors contract with one of these limited liability companies with reference to, and possibly after consulting, the list of shareholders in the company, and may be influenced considerably by the knowledge of who are shareholders in the company, and therefore I apprehend it is that the Court has always held that if an individual has allowed his name to be put upon the list of shareholders by a contract which, as between him and the company, is valid, he cannot be allowed to withdraw from the consequences of that contract as regards the payment of his calls by any collateral agreement limiting his liability as between himself and the company, but must, there being no other defence, be held liable to pay his full calls for the purpose of making good the demand against the company. But it is quite a different matter where the question is, whether the individual ever did assent by a contract valid in law to have his name put on the list of shareholders. There, no doubt, a risk intervenes

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which creditors must take. It is one of the risks, and it ought to be known that it is one of the risks, which creditors are liable to in dealing with limited companies, that it may turn out that some person whose name has been entered as a shareholder in the list has a right to have his name taken off the list if he can prove that it has been fraudulently inserted there, and if he comes with promptitude to have the fraud redressed.

I therefore think that the fact that the interest of creditors is involved in the winding-up does not alter the matter under the circumstances of a case like the present, and that the question must be disposed of as if it were to be disposed of upon the bill at the time when the bill was filed and before any winding up, in which case the Plaintiff would be entitled to the relief prayed by the bill. Therefore, with great respect to the Master of the Rolls, I am bound to come to the conclusion that the application of Mr. *Smith* ought to have been acceded to, and that his name should be removed from the list.

Solicitors for Mr. *Smith:* Messrs. *Flux & Argles.*
Solicitor for the Official Liquidator: Mr. *T. E. Harper.*

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Companies Act, 1862—*Bills of Exchange—Negotiable Securities—Notice.*

A company was formed under the *Companies Act*, 1862, for the purpose of purchasing a concession from a foreign government for the construction of a railway, and forming a *société anonyme* to make the railway. The memorandum stated that in order to attain their main object the company might do, in *England*, or *Peru*, or elsewhere, whatever they thought incidental or conducive thereto. The articles gave the directors power to do all things, and make all contracts, which, in their judgment, were necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum. It was decided in the Court below that bills of exchange accepted in manner prescribed by section 47 of the Act were binding on the company,

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for that every company constituted under the Act of 1862 has power to issue bills of exchange:—

Held, on appeal, that the *Companies Act*, 1862, does not confer on all companies registered under it, a power of issuing negotiable instruments; but that such a power exists only where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred:

But *held*, that such a power existed in the present case; for that although it could not be inferred from the nature of the business of the company, it was conferred by the above general words in the memorandum and articles.

The Court of appeal concurring in the conclusion of the Court below, but not in the reasons given for it, the appeal was dismissed without costs.

The knowledge of a director that bills indorsed for value to his company were bills which had been accepted for the accommodation of the drawer, the director not having been concerned on behalf of his company in the transaction in which the bills were indorsed to them, held not to affect the company with notice of the fact of their being accommodation bills.

THIS case came before the Court on appeal from two orders of Vice-Chancellor *Malins*, one refusing an injunction to restrain the *Thames and Mersey Marine Insurance Company, Limited*, from levying execution under a judgment obtained upon bills of exchange issued by the *Peruvian Railways Company, Limited*, and the other ordering the latter company to be wound up on the Petition of the former.

The *Peruvian Railways Company, Limited*, was registered on the 6th of May, 1865, with a memorandum dated the 4th of the same month, the 2nd and 3rd clauses of which were as follows:—

"2. The registered office of the company is to be in *England*.

"3. The objects for which the company is established are the formation of a *société anonyme*, or of two *sociétés anonymes*, in the Republic of *Peru*, for the construction of railways from the port of *Pisco* to the city of *Yca*, and from the coast and creek of *Mejia* to *Arequipa*, in *Peru*, in accordance with the provisions of two concessions granted by the government of the Republic of *Peru*, dated the 27th day of May, 1864, and the 10th day of December, 1864. As soon as such *société anonyme*, or *sociétés anonymes*, is or are formed, all the shares in the present company will be exchanged for shares in such *société anonyme* or *sociétés anonymes*, and all the assets of the present company will be transferred to such *société anonyme* or *sociétés anonymes*, and this company will be dissolved, but without prejudice to anything which may be done by the company

previous to such dissolution. In order to the attainment of the main object of the company they may do, either in the *United Kingdom*, or *Peru*, or elsewhere, whatsoever they from time to time think incidental or conducive thereto."

Articles of association were annexed to the memorandum stating among other things, that the above concessions had been granted by the government of *Peru*, and that the company was constituted for the purpose of purchasing these concessions, and forming one or more *sociétés anonymes* for the purpose of constructing the railways, and that an agreement had been entered into with the *International Contract Company, Limited*, in whom such concessions were then vested, for the purchase thereof, including the payment of all the preliminary expenses of the formation and registration of the *Peruvian Company*, and the construction and completion of the railways, and that a deed of assignment of such concessions had been prepared, and would be executed as soon as the company was constituted, and that a copy of the deed was set out in an annexed schedule. The articles provided that Table A. should not apply, and contained the following clauses:—

"Art. 4. The company shall proceed forthwith to form a *société anonyme*, or two *sociétés anonymes*, for the purpose mentioned in the memorandum of association, in conformity with the terms of the concessions of the 27th day of May, 1864, and the 10th day of December, 1864 respectively, and with the laws of the Republic of *Peru*, and that notwithstanding the whole of the capital may not have been subscribed.

"Art. 7. All contracts entered into by the company previously to the formation of the said *société anonyme*, or *sociétés anonymes*, shall be ratified and adopted by such *société* or *sociétés*.

"Art. 60. The board shall be entrusted with, and may exercise and perform, the following powers and duties, viz.:—

"(A.) The general conduct and management of the business of the company, and especially the doing of all things, and the making and performing of all contracts, which, in their judgment, are necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum of association.

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"(E.) The ascertaining, settling, and paying of all the expenses of and incident to the formation, establishment, and registration, of such *société anonyme* or *sociétés anonymes*.

"Art. 61. The board shall, in addition to those powers and duties, exercise and perform all such other powers and duties as, by the statutes and these presents respectively, are directly, or by implication, conferred and imposed on directors."

By the interpretation clause the words "the statutes" were to mean and include every Act from time to time in force concerning joint stock companies, and necessarily affecting the company.

An agreement was afterwards entered into between the *Peruvian Company* and the *International Contract Company* for the purchase by the former company from the latter of the concessions, and for the construction of the railways by the *Contract Company* for a sum payable by certain instalments. The deeds by which this arrangement was made had the seal of the *Peruvian Company* affixed to them in the presence of *P. S. Fletcher*, who was a director of that company and also of the *Contract Company*.

In February, 1866, the directors of the *Peruvian Company*, *Fletcher* being present, passed a resolution for accepting bills for £58,331 drawn upon them by the *Contract Company*. These bills were accepted accordingly, and three of them, for £5000 each, were indorsed by the *Contract Company* for value to the *Thames and Mersey Marine Insurance Company*. *P. S. Fletcher* was one of the directors of the latter company down to September, 1866. He appeared to have taken an active part on behalf of the *Contract Company* in the last-mentioned transaction, but not to have been in any way concerned in it as a director of the *Thames and Mersey Company*.

On the 15th of August, 1866, the *Thames and Mersey Company* obtained judgment, for want of appearance, against the *Peruvian Company*, on the above three bills.

On the 14th of December, 1866, the *Peruvian Company* filed their bill to restrain the *Thames and Mersey Company* from levying execution on this judgment, on the ground that the issue of the bills of exchange was *ultrà vires*, and that the bills had been accepted without consideration, and for the accommodation of the

Contract Company, and that the *Thames and Mersey Company*, through *Fletcher*, as one of their directors, had notice of this fact.

The case came before Vice-Chancellor *Malins*, on motion for an injunction against the *Thames and Mersey Company*, and on a Petition by the latter company, as creditors, for winding-up the *Peruvian Railways Company*. Evidence was entered into to shew that, at the time when the bills were accepted, nothing was due from the *Peruvian Company* to the *Contract Company*, and that the bills were, therefore, accommodation bills. The executive of the *Thames and Mersey Company*, however, positively denied all notice of this, and no ground was shewn for imputing notice to them, unless the mere fact that *Fletcher*, who was one of their directors, knew all the circumstances of the case, affected them with notice, without its being shewn that *Fletcher* took any part on behalf of the *Thames and Mersey Company*, in the transaction. His Honour was of opinion that the *Peruvian Company* had, by its constitution, power to accept bills of exchange, and that the bills in question had been accepted on its behalf, in a regular and binding way. His Honour said that the only ground on which it was contended that the bills were not binding on the company, was that a corporation could not give bills of exchange, but His Honour was of opinion, having regard especially to the 47th section of the Act of 1862, that all companies constituted under that Act might issue bills of exchange, and that the only risk which persons taking bills accepted on behalf of such a company ran, was, that the bills might have been given without the authority of the board of directors, and that, as in the present case the bills had been issued under the authority of the board, they were valid. His Honour accordingly refused the injunction, and made a winding-up order. (2 W. R. 423)

Mr. *Roxburgh*, Q.C., and Mr. *Locock Webb*, for the *Peruvian Company*, in support of their appeal:—

There is an important difference between the directors of a company contracting on its behalf a debt for which the company may be sued, in which case all defences on the merits are open, and issuing a negotiable instrument, to an action on which by a *bonâ fide* holder for value there is no defence if the directors have

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power to issue it. A corporation cannot accept bills of exchange unless the terms of its constitution authorize such a proceeding: *Bateman* v. *Mid-Wales Railway Company* (1); *Bowes* v. *Hope Life Insurance Company* (2).

[The LORD JUSTICE LORD CAIRNS:—Do not the cases go to this, that a corporation may issue bills, where the terms of the instrument under which it is constituted authorize, upon a fair construction, the issuing bills, or where the business of the corporation is one which cannot, in its ordinary course, be carried on without bills?]

Yes; but the business does not come within the rule unless it depends upon buying and selling, and it is impossible to say that this company had a business to which the issuing negotiable securities was an ordinary incident. *Broughton* v. *Manchester and Salford Waterworks Company* (3); *Dickinson* v. *Valpy* (4); *Burmester* v. *Norris* (5); *Bult* v. *Morrell* (6); are all against this power existing as incident to the business, and it would be very dangerous to hold that the vague general words in Art. 60 confer an important power of this kind. At the time when the bills were given there was nothing due from the *Peruvian Company* to the *Contract Company*. The bills were accommodation bills, and the *Thames and Mersey Company* had, through *Fletcher*, constructive notice of this; therefore, even if the bills were unexceptionable in other respects, they could not recover.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the *Thames and Mersey Company*, were not called upon.

Mr. *E. F. Smith*, Q.C., and Mr. *J. N. Higgins*, for the *International Contract Corporation*.

LORD CAIRNS, L.J.:—

The question raised in this case is one of considerable importance, and the case would be of still more importance if we were to enter-

(1) Law Rep. 1 C. P. 499.
(2) 11 H. L. C. 389.
(3) 3 B. & A. 1.
(4) 10 B. & C. 128.
(5) 6 Ex. 796.
(6) 12 Ad. & E. 745.

tain the opinion that, under the Act of 1862, and upon the construction of that Act, there is given to all companies incorporated by it, as an incident of their incorporation, the power of accepting bills of exchange, or issuing negotiable instruments. In my opinion the Act does not give that power to companies as an incident of their incorporation under it, but leaves the power of a company so incorporated, with regard to negotiable securities, to be determined upon the proper construction of the memorandum and articles of association. There may, under the Act, be companies which communicate to their directors the power to bind the shareholders by negotiable instruments. There may be companies which do not communicate any such power. If the power is to be given to the directors, in my opinion it must be given by the memorandum and articles of association.

The question, therefore, in this case is, does the memorandum, or do the articles of association, on their just and proper construction, communicate that power? To everything that was said in the case of *Bateman* v. *Mid-Wales Railway Company* (1), I desire entirely to accede. There the Court had to deal with the simple case of a railway company incorporated by one of the ordinary railway Acts; and the Court, as I understand the decision, thought that it was not a necessary incident to the carrying on the undertaking of such a company that it should have the power to issue negotiable securities; and, on the other hand, that such a power was not given by express words, or by the construction of the Act of Parliament under which the company was incorporated. In the case we have now to deal with, the object which was in view at the time this company was incorporated, namely, the creation of a company in *England*, to be transformed into a *société anonyme* abroad, and there to become the grantee of certain concessions for making railways, would not, in my opinion, confer on the company, as incident to the carrying on its business, the power of issuing negotiable instruments. We must therefore turn to the articles, and see whether they are so expressed as to confer such a power.

That question resolves itself into two points. First, the power of the company, as a company, with regard to negotiable instruments; and secondly, the right of the executive to exercise the

(1) Law Rep. 1 C. P. 499, 12 Jur. N. S. 453.

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power, if there be such a power in the company, of issuing negotiable securities.

With regard to the power of the company itself, the memorandum of association, after stating the object of the company to be the formation of a *société anonyme* in *Peru* for the construction of railways there, continues in these words: "In order to the attainment of the main object of the company they may do, either in the *United Kingdom*, or *Peru*, or elsewhere, whatsoever they from time to time think incidental or conducive thereto." Anything therefore which, in the opinion of the company (how to be expressed we shall see afterwards), is incidental or conducive to the main object of the company, which was the acquisition of concessions for railways, they may do. If, therefore, there comes to be a concession for a railway which is to be paid for by instalments, it is, I think, beyond all possibility of dispute that, if they think it incidental or conducive to the attainment of the concession, when the instalments become or are about to fall due, in place of making calls on their shareholders, they should give a bill of exchange, payable at a future day, for the amount of the instalments, they may do so. The words seem to me to be so wide that they necessarily include a power of that kind. That is a power which of course may require to be exercised by a general meeting of the shareholders, or it may be capable of being exercised by the directors.

Now, in order to ascertain by whom it is to be exercised, we must turn to the articles of association, and there I find that the 60th article is this:—[His Lordship read Article 60, to the end of clause (A).] Therefore the power which, as it seems to me, was given to the company by the memorandum, is, in my opinion, clearly delegated by the articles to the directors. Indeed, it was hardly argued that the accepting of a bill of exchange was not making a contract within the express words I have read, but it was rather said that that being so large a power, the natural meaning of these general words should be cut down, and it was argued that unless you find express mention *eo nomine* of bills of exchange, it ought not to be held that the directors had any authority to issue them. In my opinion the words cannot be so limited, but must be read according to their natural meaning, and that would include the giving of bills of exchange. Whether it be wise or

unwise to give that power to a company, or the directors of a company, is a matter for the consideration of the shareholders, who alone are affected by it; and, wisely or unwisely, they have, in my opinion, given that power by these articles. The result, therefore, is this, that so far as the *Peruvian Company* was concerned, that company had power, through its directors, to accept the bills of exchange in question in this cause.

But then it is said that those bills were accepted and given to the *International Contract Corporation* at a time when, upon a just statement of account between the *Peruvian Company* and the *International Contract Corporation*, there was not any debt due from the *Peruvian Company* to the *International Contract Corporation*. The persons, however, who are now the holders of these bills of exchange are not the *International Contract Corporation*, but the *Thames and Mersey Marine Insurance Company*. The circumstances under which the *Thames and Mersey Marine Insurance Company* acquired the bills are stated in their answer. It appears there were dealings between them and the *International Contract Corporation*, upon which the *International Contract Corporation* was largely indebted to the *Thames and Mersey Marine Insurance Company*. The *Thames and Mersey Marine Insurance Company*, in addition to having an unsecured demand, had in their hands securities to the amount (if added up rightly in the schedule to their answer) of £13,000. The *International Contract Corporation* desired the re-delivery of these securities, and an agreement was made between the *Thames and Mersey Marine Insurance Company* and the *International Contract Corporation* that the *Thames and Mersey Marine Insurance Company* should hand over these securities, in consideration of receiving from the *International Contract Corporation* the three bills of exchange in question, for £5000 each, accepted by the *Peruvian Railways Company*. So far, therefore, as the *Thames and Mersey Marine Insurance Company* were concerned, there was full consideration given for the bills, and they are the holders of the bills for value.

Now, I do not mean to say that even in that case, if it could be shewn that the *Thames and Mersey Marine Insurance Company* knew that these bills of exchange were accepted by the *Peruvian Railways Company* merely as an accommodation for another com-

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pany, namely, the *International Contract Corporation*, without any value whatever, that might not be notice to the *Thames and Mersey Marine Insurance Company* of that which would be a fraud on the shareholders of the *Peruvian Company*, such as to affect the holders of the bills. But when I come to look at the evidence of that notice I find that the Plaintiffs, on whom the burthen of sustaining such an allegation would lie, have not discharged that burthen. In the first place, the allegation in the bill is very insufficient, to say the least of it, and in their own first affidavit the allegation of knowledge on the part of the *Thames and Mersey Marine Insurance Company* of this particular fact is altogether wanting; and when I turn to the affidavits of the *Thames and Mersey Marine Insurance Company*, on which no cross-examination has taken place, and with regard to which no production has been sought of any of the documents which might negative that statement, and to which affidavits there is no reply, I find a clear and distinct denial by the secretary and directors of the company of any knowledge possessed by the *Thames and Mersey Marine Insurance Company* of the fact, if it be a fact, that these bills were accepted as between the *Peruvian Company* and the *International Contract Corporation* without value.

I think, therefore, that in the first place it is established that there was authority to accept bills on the part of the directors of the *Peruvian Company*. I think, in the second place, it is established that the *Thames and Mersey Marine Insurance Company* are holders for value; and I think, in the third place, it is not established in any way that they had any notice of the fact that there was a want of consideration, if it be a fact. Therefore the case of the bill to set aside the judgment which has been obtained entirely fails.

In my opinion the bill ought to be dismissed, but having regard to this, that the case in the Court below appears not to have been put on what (with great respect to the Vice-Chancellor) I think ought to be the ground of the decision, namely, the construction of the memorandum and articles of association, but to have been put on a broader, and, I venture to think, erroneous, view of the effect of the Act of 1862; and our judgment proceeding not upon the latter, but upon the former ground, I think the appeal should be dismissed without costs.

SIR G. J. TURNER, L.J.:—

I entirely agree. I desire only to add that I should have felt myself bound by the decision in *Bateman* v. *Mid-Wales Railway Company* (1), if I thought that case in any way applicable to the present, for I think it is the duty of all Courts of co-ordinate jurisdiction to adopt what has been solemnly decided by a Court of equal jurisdiction. But I think it has no bearing on the present case, because our judgment proceeds entirely on the particular terms of the memorandum and articles of association which regulate the proceedings of this company; and there were no such terms and no such provisions contained in the Act incorporating the *Mid-Wales Railway Company*. I quite agree with the views which my learned brother has expressed, and I am of opinion that the appeal should be dismissed, and, for the reasons he has stated, without costs.

Mr. *Kekewich* referred to the observations of the Lord Chancellor in *Phillips* v. *Hudson* (2), and submitted that the dismissal should be with costs, the *Thames and Mersey Company* never having contended for the general doctrine laid down by the Vice-Chancellor.

SIR G. J. TURNER, L.J.:—

The case has come here in consequence of the general principle laid down, with which we do not agree. We think that there was reasonable ground for the Appellants coming here, and we cannot dismiss the appeal with costs.

Both appeals were accordingly dismissed, without costs.

Solicitors for the *Peruvian Railways Company:* Messrs. *Vallance & Vallance.*

Solicitors for the *Thames & Mersey Company:* Messrs. *Freshfields & Newman.*

Solicitors for the *International Contract Corporation:* Messrs. *Lewis, Munns, & Co.*

(1) Law Rep. 1 C. P. 449.

(2) Law Rep. 2 Ch. 243, 249.

L. C.
1867
July 10, 13.

SEAGRAM *v.* KNIGHT.

Waste—Timber—Tenant for Life—Remainderman—Trustee—Statute of Limitations.

The Court would not be justified in ordering timber to be cut on the application of a tenant for life impeachable for waste, merely because it was ripe for cutting, unless it were also decaying, or injuring the growth of other timber.

If a tenant for life impeachable for waste, cuts timber without the leave of the Court, he will never be permitted to derive any advantage from his wrongful act.

In such a case, the act being wrongful, the *Statute of Limitations* begins to run against the remainderman from the time of the cutting.

Where a debtor takes out administration to his creditor, the running of the statute will be suspended during the administration.

Decree of the Master of the Rolls affirmed with variations.

THE Plaintiff in this case was the heir and the administrator of his father, *W. Lye Seagram*, who was remainderman in fee expectant on the decease of his father, *W. F. Seagram*, tenant for life impeachable for waste of certain real estate. The tenant for life had cut down timber in 1831, 1842, 1843, and 1844, and subsequently to 1844. *W. Lye Seagram* attained the age of twenty-one in 1834, and died in 1844; and administration to his estate was taken out by the tenant for life, who died in 1864. In March, 1865, the Plaintiff came of age, and in March, 1866, filed this bill against the executors of *W. F. Seagram*, the tenant for life, for an account of the produce of the sales of the timber so cut. The Master of the Rolls considered that as the cutting was without the sanction of the Court, it must be considered as wrongful; that the *Statute of Limitations* began to run from the time when *W. Lye Seagram* attained the age of twenty-one; and that the Plaintiff was entitled only to an account of timber cut since the death of *W. Lye Seagram*.

The Plaintiff appealed. The facts of the case appear fully in the report of the case before the Master of the Rolls (1).

Mr. *Selwyn*, Q.C., and Mr. *Wickens*, for the Plaintiff:—

The *Statute of Limitations* does not apply in this case until the

(1) Law Rep. 3 Eq. 398.

death of the tenant for life, as he did merely what the Court would have directed him to do in cutting the timber, and he properly kept the proceeds until his death, when the remainderman became entitled to them. Whether he actually invested them, or did not, makes no difference, for the money would follow the inheritance: *Gent* v. *Harrison* (1); and if the tenant for life did what was right in cutting the timber he would be entitled to the income for his life: *Bagot* v. *Bagot* (2). A suit does not make a thing right or wrong, and can never be necessary in such a case except for the protection of the tenant for life. The only right the remainderman has is to see the money properly invested, and he is not obliged to apply until the death of the tenant for life.

But assuming that the tenant for life was not entitled to the income, then the *Statute of Limitations* has not run, because the father became administrator to his son, and the same hand therefore was to pay and to receive: *Burrell* v. *Earl of Egremont* (3); *Wynn* v. *Styan* (4). If he had either invested the money, or declared himself trustee, the statute would not have run, and what advantage can he derive from not having done that which he ought to have done. He was the trustee as he had the legal estate and no trustees were interposed. If it is held that the statute runs in this case it is a clear encouragement to a tenant for life to cut timber without applying to the Court, as he has then an opportunity of saying that the timber was wrongfully cut, and that he claims the benefit of the statute.

Mr. *Southgate*, Q.C. (Mr. *W. W. Cooper* with him), for the Defendant:—

The only case where the Court has given a subsequent sanction to the cutting of timber is *Waldo* v. *Waldo* (5) and there it was cut by a trustee. Of course, the Court sanctions proper acts done by a trustee, but here we are dealing with legal estates. The Court will only sanction the cutting of timber where it is decaying, or injurious to other timber: *Hussey* v. *Hussey* (6); and will in no other case give the income to the tenant for life: *Perrot* v.

(1) Joh. 517.
(2) 32 Beav. 509.
(3) 7 Beav. 205.
(4) 2 Ph. 303.
(5) 12 Sim. 107.
(6) 5 Madd. 44.

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Perrot (1); *Whitfield* v. *Bewit* (2); *Bewick* v. *Whitfield* (3); *Wickham* v. *Wickham* (4); *Lushington* v. *Boldero* (5). It is true that the text books treat the tenant for life as entitled to the income, but the only case is *Tooker* v. *Annesley* (6).

The LORD CHANCELLOR stopped Mr. *Southgate*, and said that he had been considering the case, and would hear the reply.

Mr. *Selwyn*, in reply:—

In *Ferrand* v. *Wilson* (7) the Vice-Chancellor *Wood* says he has repeatedly ordered timber to be cut, and there is no difference between decaying timber and timber fit to be cut, and the tenant for life is, in Chancery, always considered to be entitled to the income, and therefore the statute does not run in his favour.

LORD CHELMSFORD, L.C.:—

The question to be determined in this case is, whether the Plaintiff is entitled to institute a suit against the personal representative of his grandfather to obtain payment out of his estate of the amount received by him for timber which he cut down and sold during the time that he was tenant for life impeachable for waste. [His Lordship then stated the facts of the case.]

It is contended on the part of the Plaintiff that the tenant for life having merely done what the Court, upon application, would have sanctioned, the case must be considered as if every thing had been done under the authority of the Court, and as if the money produced by the sale of the timber had been invested and the interest received by the tenant for life, the right of the reversioner to the principal not accruing till the death of the tenant for life.

There can be no doubt, as the counsel for the Plaintiff said, that what a trustee would be ordered by the Court to do is valid if done by him without the previous authority of the Court. But I do not see how that rule of equity can apply to a case where the act when done was wrongful, and where the tenant for life had no right to assume, when he did it, that the Court, if applied to, would have

(1) 3 Atk. 94.
(2) 2 P. Wms. 240.
(3) 3 Ibid. 267.
(4) 19 Ves. 419.
(5) 15 Beav. 1; see *Craig* on Trees, p. 124.
(6) 5 Sim. 235
(7) 4 Hare, 344.

sanctioned it. I am strongly of opinion that if an application had been made to the Court it would not, under the circumstances, have allowed this timber to be cut. It is said, indeed, that "it was ripe for felling when so cut," but not that it was necessary to be cut, either on account of decay or because of overcrowding. And the remainderman in fee being at the time of the first cutting under age, I do not think that the Court would have been justified in ordering the timber to be cut upon the application of the tenant for life, merely because it was ripe for cutting. In *Hussey* v. *Hussey* (1) it was said by Sir *John Leach*, that where there is a tenant for life impeachable for waste, the Court can only authorize the cutting of such timber as is decaying, or which it is beneficial to cut by reason that it injures the growth of other trees. This was Lord *Talbot's* opinion, in the case of *Bewick* v. *Whitfield* (2), where he said:—"With regard to the timber plainly decaying, it is for the benefit of the persons entitled to the inheritance that it should be cut down, otherwise it would become of no value." If the tenant for life in this case had applied to the Court for leave to cut the timber, he must have shewn that it would be for the benefit of the person in remainder that the timber should be cut, and, therefore, it is incorrect to assume, as is done both in the bill and answer, that nothing more being stated than that the timber was ripe for felling, the Court, if applied to for that purpose, would have ordered it to be cut.

It was said, that where there is a tenant for life impeachable for waste, he is entitled for his life to the interest of the money produced from the sale of timber cut down and sold under the authority of the Court. And Vice-Chancellor *Wood*, in the case of *Gent* v. *Harrison* (3), expressed a similar opinion where the timber was rightfully cut. The case of *Waldo* v. *Waldo* (4) hardly reaches to the full extent of the proposition, because there the tenant for life had an interest in the timber beyond her right in it while standing, being entitled to cut it down for repairs. Of this right she was deprived, although it appeared that there remained standing on the estate timber amply sufficient for future repairs. But whatever

(1) 5 Madd. 44.
(2) 3 P. Wms. 267.
(3) Joh. 517; see also *Craig* on Trees, p. 146.
(4) 12 Sim. 107.

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may be the course adopted by the Court where a tenant for life impeachable for waste obtains its leave to cut down timber, I entertain no doubt that if he takes upon himself to cut and sell timber without authority, he does it at his peril, and he can never be permitted to derive any advantage from his wrongful act. There is abundant authority for this, but I need only mention the case of *Williams* v. *Duke of Bolton* (1).

The act of the tenant for life being, therefore, a tortious act, the remainderman might either have brought an action of trover for the trees which became his property from the moment they were felled, or an action for money had and received for the produce of the sale. He might also have instituted a suit in equity; for, as Lord *Macclesfield* said, in *Whitfield* v. *Bewit* (2), it may be very necessary for the party who has the inheritance to bring his bill in this Court, because it may be impossible for him to discover the value of the timber, it being in the possession of, and cut down by, the tenant for life. But if the *Statute of Limitations* had run against his remedy at law, it would be too late to institute a suit in equity for an account of moneys received in respect of timber cut and sold.

At the time of the first cutting, in 1831, *William Lye Seagram* was under age, but he attained his majority in 1834. From that time the statute began to run, and in respect of the first cuttings, the remedy of *William Lye Seagram* was barred at his death in 1844.

The next cutting, which took place during the life of *William Lye Seagram*, was in 1842; of course, as in the former instance, the act being wrongful, the statute began to run immediately. But on the death of *William Lye Seagram*, his father, the tenant for life, took out administration, and became the person entitled to receive as well as liable to pay for the wrong done to the remainderman. It occurred to me, at this part of the case, to express a doubt whether the *Statute of Limitations*, having once begun to run, could ever be stopped. But upon examination of the authorities, I am disposed to think that my suggestion was not well founded. It appears from *Nedham's Case* (3), and *Wankford* v. *Wankford* (4),

(1) 3 P. Wms. 268 n.
(2) 2 Ibid. 240.
(3) 8 Rep. 135 a.
(4) 1 Salk. 299.

that where administration of the goods of a creditor is committed to a debtor, this being by act of law, is not an extinction of the debt, but a suspension of the remedy. As, therefore, during the life of *William Frowd Seagram*, there could be no action brought, the running of the statute was stopped until his death in 1864, and the bill was filed on the 26th March, 1866. As far as the case rests upon the statute, I think that the Plaintiff is entitled to an account of the timber cut in 1842, and in the two following years, during the lifetime of *William Lye Seagram*. If it had been necessary to consider the case apart from the statute, it might, in my opinion, be fairly presumed, from length of time, that the parties had either settled accounts, or that the Plaintiff's father had waived his claim in respect of the timber cut in 1831. But I do not see my way clearly to such a presumption as to the cuttings in 1842, 1843, and March, 1844. The Plaintiff's right to an account of the timber cut during these periods not being barred by the *Statute of Limitations*, and there being no sufficient grounds to raise the presumption of a settlement of his claim. I think that the decree of the Master of the Rolls must be varied so as to make the account embrace the years 1842, 1843, and March, 1844; and that in all other respects it must be affirmed.

Mr. *Southgate*, and Mr. *W. W. Cooper*, called His Lordship's attention to *Rhodes* v. *Smethirst* (1), as to the suspension of the time of running of the statute, and to *Tullet* v. *Tullet* (2), as shewing that the heir, and not the administrator, would be entitled to the money; and that therefore the question did not arise.

The LORD CHANCELLOR said, that in *Rhodes* v. *Smethurst* the creditor, not the debtor, was the executor, and that as the remainderman might have brought trover, his administrator, and not his heir, must be entitled to the money.

Solicitors for the Plaintiff: Messrs. *Underwood & Colman*, agents for Messrs. *Seagram & Wakeman, Warminster*.

Solicitors for the Defendant: Messrs. *Vizard, Crowder, & Co.*, agents for Messrs. *Chapman & Ponting, Warminster*.

(1) 4 M. & W. 42.

(2) 1 Amb. 370; 1 Dick. 322; see also *Craig* on Trees, pp. 84, 110.

L. JJ.
1867
July 18, 19, 22.

LAW *v.* GLENN.

Mortgagor and Mortgagee—Receiver—Receipt of Rents.

A first mortgage was made to secure a principal sum, with interest at £5 per cent., and was accompanied by a receivership deed in the common form. A subsequent mortgage was made to *M.*, containing a stipulation that if the interest should be in arrear forty days, the receiver under the former deed should act, and should stand possessed of the rents, after payment of interest on the first mortgage, in trust to pay the interest on *M.*'s mortgage, and pay the ultimate surplus to the mortgagor. The first mortgagees and the receiver had notice of this deed. By a subsequent deed the property was charged, in favour of the first mortgagees, with an extra £1 per cent. interest on the sum secured by the first mortgage. The receiver at times took possession at the instance of the first mortgagees, and from the date of the last-mentioned deed interest at the increased rate was uniformly paid to the first mortgagees, sometimes by the mortgagor, and at other times by the receiver with his consent, no notice ever having been given to the receiver to pay interest to *M.*, or that his interest was in arrear. A foreclosure suit having been instituted by the first mortgagees, a decree was made directing the usual account of what was due on the first mortgage. The Chief Clerk certified the whole principal to be due, but the Vice-Chancellor directed him to review his certificate, and to charge the first mortgagees with everything they had received from the receiver in excess of £5 per cent.:—

Held, that this decision could not be maintained, for that whether the extra £1 per cent. was rightfully received, or not, it was neither paid nor received in respect of the principal moneys and interest secured by the first mortgage, and could not be attributed to it, nor taken into account in ascertaining what was due on the first mortgage, and that *M.*'s claim (if any) in respect of such extra payments must be enforced by some independent proceeding:

Held by *Rolt*, L.J., that *M.* had no such claim, for that the trust to pay *M.*'s interest out of the surplus rents did not attach unless and until the receiver had notice that such interest was in arrear.

THIS was a motion by the Plaintiffs by way of appeal from a decision of Vice-Chancellor *Stuart*.

By indenture, dated 3rd of August, 1850, *John Glenn* mortgaged certain property in fee to certain mortgagees for securing £13,000, with interest at £5 per cent., reducible to £4 10*s.* per cent. on payment within a limited time.

By indenture, dated the same 3rd of August, 1850, made between the mortgagor of the first part, the mortgagees of the second part, and Mr. *Hussey* of the third part, *Hussey*, who was one of the firm

of solicitors who acted for the mortgagees, was appointed receiver of the rents. The deed was in the usual form, the mortgagor appointing the receiver; and it was declared that the receiver should stand possessed of the rents in trust, after payment of outgoings, to pay the interest to the mortgagees, and the surplus to the mortgagor. The deed contained the usual declaration, that the mortgagee should not be answerable for any defaults of the receiver. The receiver was not to act unless interest was in arrear for sixty days.

On the 22nd of July, 1851, *Glenn* made a second mortgage of the same property to *E. Hughs*, to secure £2000 and interest. This deed contained a covenant similar to the covenant set out in the next mentioned deed.

On the 15th of December, 1852, *Glenn* made a third mortgage to *Martin* and others to secure £6000, and interest at £5 per cent. The mortgage deed recited the two prior mortgages and the receivership deed, and contained a covenant by the mortgagor with the mortgagees, "that in case default shall be made in payment of the interest upon or in respect of the principal moneys for the time being due on this security by the space of forty days next after one of the days hereinbefore appointed for payment thereof, then the said *H. S. L. Hussey*, as such receiver as aforesaid, or any other receiver to be appointed under the said indenture of the 3rd of August, 1850, secondly hereinbefore recited, shall forthwith take upon himself the office of, and proceed to act as, the receiver of the rents and profits of the hereditaments hereinbefore expressed to be hereby assured, and that the said *H. S. L. Hussey*, or such other receiver as aforesaid, shall stand possessed of the rents and profits of the said hereditaments, as and when the same shall be received by him, upon the trusts in the said last-mentioned indenture of the 3rd of August, 1850, and the said indenture of the 22nd of July, 1851, particularly mentioned, with the exception of the trust as to the ultimate surplus of the said rents and profits, and that in lieu of the last-mentioned trust the said *H. S. L. Hussey*, or the receiver for the time being of the said rents and profits, shall stand possessed of the surplus of the said rents and profits which shall remain after satisfying the trusts and purposes of the said last-mentioned indentures, except as aforesaid, upon trust from time to time to pay to the said *J. Martin*, &c., their

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executors, administrators and assigns, all interest from time to time to grow due in respect of the principal moneys hereby secured, and to pay the ultimate surplus, if any, of the said rents and profits to the said *J. Glenn*, his executors, administrators, and assigns."

By an indenture, dated the 21st of June, 1856, indorsed on the first mortgage, and made between the mortgagor of the one part, and the first mortgagees of the other part, the provision for reduction of interest on punctual payment was released, and the interest payable under the first mortgage deed was increased by £1 per cent., to be payable from the 3rd of February then last past. This deed shortly recited the second and third mortgages, but did not mention the stipulations as to the receiver contained in them.

The Plaintiffs, who were entitled to the benefit of the first mortgage, and the security of the 21st of June, 1856, filed their bill for foreclosure. The third mortgagees, by their answer, set up, "that the Plaintiffs and their predecessors in title under the said indenture of the 21st of June, 1856, have, from time to time, without our knowledge or consent, received interest on the said principal sum of £13,000, at the rate of £6 per cent., or, at all events, some higher rate of interest than they were entitled to under the provisions of the said indenture of mortgage of the 3rd of August, 1850; and we submit to this honourable Court that in taking the account of what is due to the Plaintiffs on their said security, such receipts in excess of interest ought to go in reduction of the said principal sum of £13,000."

The bill was then amended by inserting a statement of the receivership deed, which had not been previously mentioned, and alleging the extra £1 per cent. to have been paid sometimes by the mortgagor, and during the rest of the period by the receiver with his consent and by his direction.

On the 7th of July, 1866, a decree was made ordering an "account to be taken of what is due to the Plaintiffs for principal and interest on their mortgage of the 3rd of August, 1850, in the bill of complaint mentioned, and for their costs of this suit, to be taxed by the Taxing Master, and including their costs, charges, and expenses in the bill mentioned to have been incurred in relation

to the proposed transfer of the mortgaged premises in the said bill mentioned." The decree then provided for redemption on payment by the second mortgagees of what was so found due, and in default of payment the second mortgagees were to be foreclosed. The decree then proceeded with successive foreclosures and redemptions, in a manner which need not be specified for the present purpose; and it did not contain any special inquiry applicable to the £1 per cent. additional interest.

The question in this appeal was raised on taking the account of what was due to the first mortgagees on the first mortgage.

In January, 1856, the receiver had notice of the third mortgage. He received rents for the first time under a notice given to the tenants in March, 1856. The third mortgagees alleged that they were at that time in receipt of the rents, and gave it up in consequence of a threat by the first mortgagees of exercising their power of sale. In March, 1860, the receiver entered into possession again, and received rents up to 1862. The receiver, in his evidence, stated that he retired from possession when interest had been paid to the first mortgagees; that he rendered his account to the mortgagor, and paid interest to the second mortgagees when they claimed it under an authority from the mortgagor; and that the mortgagor had approved his accounts. It appeared that neither the second nor third mortgagees had ever given the receiver notice that their interest was in arrear, or that they required him to act for them and pay their interest out of the rents.

The receiver, while in possession, paid to the first mortgagees, out of the rents, interest at £6 per cent., as stipulated by the deed of the 21st of June, 1856, and at other times interest had been paid by the mortgagor, the result being, that as between the first mortgagees and the mortgagor the first mortgagees had, down to the 3rd of February, 1867, received all the interest payable to them according to the terms of the deeds of the 3rd of August, 1850, and the 21st of June, 1856, but nothing on account of principal. The Chief Clerk certified that there was due to them the principal sum of £13,000, with interest, at £4 10*s.* per cent., from the 3rd of February, 1867.

The third mortgagees applied to vary this certificate, and on the 19th of March, Vice-Chancellor *Stuart* made an order directing

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the Chief Clerk to review his certificate, and in taking the account of what was due to the Plaintiffs, to charge them with everything they had received from the receiver in excess of £5 per cent.

The Plaintiffs appealed.

Mr. *Law*, for the Plaintiffs:—

This is an order directing the account to be taken in a way inconsistent with the decree, which cannot be done in Chambers. It is matter for re-hearing: *Nelson* v. *Booth* (1). We cannot be charged as having received rents: the receiver is the agent of the mortgagor, not of the mortgagee: *Jefferys* v. *Dickson* (2). What he paid us he paid us by the direction of the mortgagor, and it is just the same thing as if the mortgagor had paid us the extra £1 per cent. from any other source. The Vice-Chancellor relied a good deal on the circumstances that the receiver, when he gave notice to the tenants, described himself as agent of the mortgagee, besides referring to the receivership deed; and that he admits he acted under the directions of the first mortgagee. As to the first point, his describing himself as agent of the mortgagee cannot deprive the mortgagee of the benefit of the stipulations in the receivership deed; and as to the second point, a receiver, of course, always acts by the direction of the mortgagee. It is not to be supposed that the mortgagor goes and says to him, "I am behind hand in paying my interest, go and take possession and pay it." As regards the stipulations in the third mortgage deed, I submit they only made the receiver a receiver for the third mortgagees, if they called upon him to act as such, and that they did not create a complete trust, which he was to carry into effect without their asking him to do so.

Mr. *Pearson*, Q.C., and Mr. *T. Stevens*, for the third mortgagees:—

The receiver had notice of the third mortgage, and of the stipulations therein contained, and so had the first mortgagees. This being so, the receiver could not make payments to the first mortgagees in respect of their fourth mortgage in derogation of the rights of the intervening mortgagees: *Berney* v. *Sewell* (3). No

(1) 3 De G. & J. 119. (2) Law Rep. 1 Ch. 183, 190.
5 Jur. N.S. 29 (3) 1 Jac. & W. 647.

doubt a receiver is, for most purposes, the agent of the mortgagor, so that a mortgagee acting *bonâ fide* is not answerable for the receiver's defaults; but it does not follow that the mortgagee can retain money which the receiver has paid him, when both parties knew it ought to have been paid to the second mortgagee. The receiver ousted the third mortgagee, and after this he was the more bound to pay regard to his rights. From the fact of the third mortgagees having taken possession, the first mortgagees and receiver had notice that their interest was in arrear. It was not necessary that we should give formal notice to the receiver; when he was in possession his duty towards us accrued.

[The LORD JUSTICE LORD CAIRNS:—Are you not trying to attribute to the first mortgage sums which the first mortgagees received under an entirely different title?]

If they received out of the rents what ought to have gone to us it is just the same as if they had entered into receipt of the rents.

Mr. *Law*, in reply:—

Thomas v. *Brigstocke* (1) shews in the strongest way the absence of all title in a mortgagee to back rents; and *Bertie* v. *Lord Abingdon* (2) illustrates the same principle, and also shews that the receiver was not bound to pay subsequent incumbrancers if they did not ask him. Now, no notice was given to us, or to the receiver, that the rent of the third mortgagees was in arrear forty days, still less, that they required the receiver to pay it. *Parkinson* v. *Hanbury* (3) shews that the Court will not readily infer possession in the character of mortgagee.

July 22. LORD CAIRNS, L.J., after stating the facts of the case, continued:—

The third mortgagees contend that the sums paid to the first mortgagees out of the rents in respect of their increased interest ought to go in reduction of the principal sum secured by the first mortgage. Apart from the special circumstances which have been relied on, this would be nothing more than a claim by mort-

(1) 4 Russ. 64. (2) 3 Mer. 560, 567. (3) Law Rep. 2 H. L. 1.

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gagees to back rents, which of course could not be maintained. It is contended, however, that there are in this case special circumstances which take it out of the general rule; that under a clause in the third mortgage deed the receiver held the rents upon trust out of the surplus to pay the interest of the third mortgage, and that the first mortgagees and the receiver had notice of this, because the third mortgage is recited in the fourth, and because, moreover, when the third mortgagees had entered into possession the first mortgagees objected to their being in possession, and threatened to sell unless they gave up possession, which the third mortgagees accordingly did. I give no opinion whether this case would, in a proper form of proceeding, entitle the third mortgagees to any relief; but I am of opinion that in the present state of the proceedings their contention fails. They argue that the Plaintiffs, having received money which they knew to be affected with a trust in favour of the second and third mortgagees, must refund it. But that is not the kind of relief given by the order under appeal. That order directs the moneys so received by the Plaintiffs to be applied in reduction of the moneys due to them on their first mortgage; the result being, in substance, an account against them, with rests. It seems to me clear that such an order cannot be maintained. The decree directs an account of what is due for principal and interest on the first mortgage. Now, the sums which the Plaintiffs are alleged wrongfully to have received were neither paid nor received on the footing that they were to go in reduction of what was due on the first mortgage, they were paid and received in respect of the additional interest stipulated for by the fourth mortgage, and, whether rightfully or wrongfully received, they cannot be attributed to the first mortgage. If the third mortgagees have any case as to these sums they must assert it in some proceeding adapted for recovering trust money paid to the wrong party.

SIR JOHN ROLT, L.J., after stating the proceedings in the cause down to the order under appeal, continued:—

From this order the present appeal has been brought by the Plaintiffs, and the question is, whether the Plaintiffs, the first mortgagees, are entitled, having regard to the terms of the decree,

to apply the moneys paid to them by the receiver, in excess of the interest due on their first mortgage security, in payment of the additional interest secured to them by the indenture of the 21st of June, 1856, or whether, on taking the accounts directed by the the decree, such excess of interest should be applied in reduction *pro tanto* of the principal of their mortgage debt.

It was contended on behalf of the Defendants, the Messrs. *Martin*, that the appointment of the receiver by the deed of even date with the Plaintiffs' first mortgage (which was in the usual form of such deeds) did not constitute the receiver for all purposes the agent of the mortgagor, and that, in fact, the receiver must be deemed when in possession to have received the rents as agent of the Plaintiffs, and that the only object and effect of the receivership deed was to prevent the Plaintiffs from being charged in the accounts for wilful neglect or default. No direct authority was cited for this proposition, and if it were necessary now to decide it I should hold that it could not be maintained, and that the receiver must be treated as being for all purposes the agent of the mortgagor, and that the payments made by him to the mortgagee were payments by a mortgagor continuing in possession of the mortgaged estate. But the case proceeds so entirely on special circumstances that it is unnecessary to pursue this further.

The mortgage deed of the Messrs. *Martin*, of the 15th of December, 1852, contained a covenant by the mortgagor with them (not stated in the bill), to the effect that in case of default in the payment of interest for forty days, then the receiver appointed by the receivership deed of the 3rd of August, 1850, should also, in effect, be receiver under Messrs. *Martin's* mortgage deed, and that in lieu of acting on the trusts of the ultimate surplus of the rents and profits, as declared by the deed of August, 1850, the reciever should, out of any such surplus, pay Messrs. *Martin* their interest. This deed was shortly recited (though the recital does not appear by the bill) in the Plaintiffs' second security of the 21st of June, 1856.

It was contended on behalf of Messrs. *Martin*, and I think rightly, that the receiver and the Plaintiffs must be deemed to have had notice of this covenant. But it does not appear that the Plaintiffs ever had notice that the interest due to the Messrs.

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Martin on their mortgage was in arrear, or that the receiver was ever specifically required to apply the ultimate surplus of the rents and profits in his hands in payment of interest to Messrs. *Martin*. It was said, however, that the special circumstances of the case were equivalent to such notice and requisition. The main fact relied on for this purpose is, that the Defendants, at or about the latter end of the year 1855, had entered into possession of the mortgaged premises, and received some portion of the rents thereof, and had offered to the Plaintiffs to pay their interest regularly, but that the Plaintiffs declined this proposal, and insisted on the Defendants going out of possession, on pain of the Plaintiffs immediately exercising their power of sale, and that the Defendants immediately went out of possession. From this it was argued that the Plaintiffs must have known that the Defendants' interest was in arrear, and that when, in 1856, they took security for additional interest, and subsequently, when the receiver was in possession, they must be taken to have been fully aware that the Defendants looked to the surplus rents in the hands of the receiver for payment of their interest, and that, consequently, the Plaintiffs must be charged in the same manner as they would have been if Defendants had given the most formal notice or requisition, founded on their rights, to the receiver. I think this consequence does not follow from the facts proved. It does not even now appear, so far as I am aware, that the Defendants' interest was, in fact, at any time forty days in arrear, and certainly not that the Plaintiffs or the receiver knew of any such arrear at any time while the receiver was in possession, and as both parties were clearly standing on their strict rights, the Plaintiffs' rights cannot, in my opinion, be affected by any inference from the facts I have referred to.

The case, therefore, against the Plaintiffs is reduced merely to notice of the covenant as to the receiver contained in Messrs. *Martin's* deed of the 15th December, 1852. Did notice of that covenant, without more, constitute the receiver a trustee of the surplus rents for Messrs. *Martin?* If it did, and if the Plaintiffs received those surplus rents from the receiver, with notice of that trust, they are now, in a proper proceeding for that purpose, liable in some way to account for those rents. The question is one not

without difficulty, and there is much force in the reasoning of the Vice-Chancellor on this point, but my opinion is, that the receiver was not, under the circumstances, a trustee of the surplus rents for Messrs. *Martin*. I think no part of the covenant was to come into operation unless Messrs. *Martin's* interest was forty days in arrear, and that without some such notice or requisition as that above referred to, the receiver was justified in paying, with the concurrence of the mortgagor, the surplus rents in question to the Plaintiffs in or towards satisfaction of their additional interest. It is not, however, necessary to rest the decision on this part of the case. For assuming this not to have been so, what relief would the Defendants have been entitled to in respect of the erroneous payment of such surplus rent to the Plaintiffs? I apprehend the utmost the Defendants could have insisted on would have been that the amount should be refunded with simple interest at £4 per cent. It had not been paid to the Plaintiffs, nor had they accepted it, as a payment on account of the capital of their debt, but it had been paid and appropriated as on account of their additional interest, and, assuming this payment and appropriation to have been wrongful, my opinion is, that there is no equity under these circumstances to compel them, in the account directed by this decree, to apply this sum in reduction of their capital debt, which carries interest at 5 per cent., and to so apply it in an account which would practically charge the Plaintiffs with rests. Nor could any such relief be given, in my opinion, under any decree which could possibly have been made in this suit.

Upon the whole, therefore, I am of opinion that the order of the 19th of March should be discharged.

Solicitors for the Plaintiffs: Messrs. *Law, Hussey, & Hulbert*.
Solicitors for the Second Mortgagees: Messrs. *Ellis & Ellis*.
Solicitor for the Third Mortgagees: Mr. *Charles Stevens*.

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BIRCH *v.* SHERRATT.

Will—Annuity—Payable out of Corpus.

A testator directed his trustees to convert and invest his property, and "with and out of the interest, dividends, and annual proceeds thereof, levy and raise the annual sum of £100," and pay it to his mother for life, "and from and after the payment of the said annual sum of £100, and subject thereto," he declared that the trustees should stand possessed of his said trust moneys, stocks, funds, and securities, upon the trusts thereinafter mentioned. The income of the whole estate being insufficient to pay the annuity:—

Held (reversing the decision of *Stuart*, V.C.), that the deficiency must be paid out of the *corpus*.

Held, by Lord *Cairns*, L.J., *dubitante Rolt*, L.J., that the terms in which the annuity was given would not, apart from the terms of the gift over, have been sufficient to charge it on the *corpus*, or on the income accruing after the death of the annuitant.

THIS was an appeal by an annuitant from a decision of Vice-Chancellor *Stuart*, that her annuity was not payable out of the *corpus* of the property charged with it, the income being insufficient to pay it.

The testator gave his real and personal estate to trustees upon trust for sale and conversion, and directed them to invest the proceeds as therein mentioned, and to stand possessed of the trust funds "upon trust that they the trustees, and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor, do and shall with and out of the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, mortgages and securities, levy and raise the annual sum of £100, and pay the same by four equal quarterly instalments to my dear mother or her assigns during her natural life, and *from and after the payment of the said annual sum of* £100, *and subject thereto*, I do hereby declare that my said trustees for the time being shall stand possessed of the said trust moneys, stocks, funds, mortgages, and securities, upon the trusts, and for the ends, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same (that is to say)". The testator then gave the fund in thirds for the benefit of his two brothers and sisters during their respective lives, with remainder to such of their respective

children as should attain twenty-one, or marry, with cross limitations in the event of any not having a child attaining a vested interest.

The residuary estate of the testator applicable for payment of the annuity, was less than £2000, and a large arrear of the annuity was due. The question then arose whether the deficiency of the income to meet the annuity must be made good out of the capital, in which case it was most probable that the whole fund would be absorbed in the payment. Vice-Chancellor *Stuart* decided that the annuity was payable out of income only (1).

Mr. *Kay*, Q.C., and Mr. *Rigby*, for the Appellant:—

We submit that the capital as well as the income is devoted to payment of this annuity: *Playfair* v. *Cooper* (2); *Phillips* v. *Gutteridge* (3), in each of which cases the testator shewed that he contemplated the income being sufficient to pay the annuity. *Boyd* v. *Buckle* (4); *Wroughton* v. *Colquhoun* (5); *Picard* v. *Mitchell* (6); *Croly* v. *Weld* (7); *Torre* v. *Browne* (8); all support the same view. *Baker* v. *Baker* (9) is broadly distinguishable; the widow there was only made tenant for life of a fund, the amount of which was ascertained by saying that it was to be a fund which would produce £200 a year. There was no gift to her of an annuity of £200 a year, nor a single word that could be construed as meaning that she was to receive £200 a year at all events, whether the estate was sufficient to provide that fund or not. In *Foster* v. *Smith* (10), the *corpus* was given over "from and immediately after the death" of the annuitant; not as here, from and after "the payment of the annuity and subject thereto."

If the *corpus* is not charged, at all events the income after the annuitant's death is charged: *Forbes* v. *Richardson* (11); *Stelfox* v. *Sugden* (12); which latter case (13), is also in favour of the *corpus* being charged.

(1) Law Rep. 4 Eq. 58.
(2) 17 Beav. 187.
(3) 11 W. R. 12; 8 Jur. (N.S.) 1196.
(4) 10 Sim. 595.
(5) 1 De G. & Sm. 36, 357.
(6) 14 Beav. 103.
(7) 3 D. M. & G. 993.
(8) 5 H. L. C. 555.
(9) 6 Ibid. 616.
(10) 1 Ph. 629.
(11) 11 Hare, 354.
(12) Joh. 234.
(13) See p. 240.

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Mr. *Cole*, Q.C., and Mr. *Procter*, for one of the residuary legatees:—

If this will is looked at without reference to authorities and technical rules, there can be no doubt what the testator meant. He directed the annuity to be paid out of income and he meant nothing more. The direction to "levy and raise" does not alter the case: *Clifford* v. *Arundell* (1). A direction to levy and raise a gross sum out of rents and profits, no doubt enables a mortgage of future rents and profits; but a direction to raise an annual sum out of income does not entitle the annuitant to resort to anything more than the year's income for the year's annuity: *Perkins* v. *Cooke* (2); *Earle* v. *Bellingham* (3); *Miller* v. *Huddlestone* (4); *Foster* v. *Smith* (5); are strong authorities in support of the Vice-Chancellor's decision.

Mr. *Cotton*, Q.C., and Mr. *Lindley*, for another residuary legatee:—

The only rule in these cases is, that the testator's intention must be gathered from the whole scope of his will: *Baker* v. *Baker* (6); and an intention which, in the events that have happened, would give everything to the annuitant, is not to be gathered from it. In *Wroughton* v. *Colquhoun* (7) the annuity was not, as here, given out of the income.

Mr. *Cracknall*, for another party in the same interest.

LORD CAIRNS, L.J.:—

As this case has been argued so fully before us, and we have had an opportunity of considering it out of Court, after having heard the greater part of the arguments, we need not trouble Mr. *Kay* in reply.

The effect of this will, as of every other will, must be judged of by the proper construction of the language the testator has used, and cases are of little value except so far as they shew that some definite construction has been put upon any word, or set of words, which may be found in the will.(a)

(1) 1 D. F. & J. 307.
(2) 2 J. & H. 393.
(3) 24 Beav. 445.
(4) 3 Mac. & G. 513.
(5) 1 Ph. 629.
(6) 6 H. L. C. 616.
(7) 1 De G. & Sm. 36, 357.

(a) See also dicta of Lord Justice Knight Bruce in Harris v. Cassey 11 H. L. C. [illegible]

Now, I quite agree with what was urged by the Respondents, that the first and principal object in the testator's mind, probably, was to deal with his income, for he directs the conversion of his general estate, and the investment of it, and then directs that out of the income £100 a year shall be paid to his mother for her life, and it is quite possible that he may have been perfectly satisfied in his own mind that the income would be sufficient, and continue to be sufficient, to pay that sum. It is also possible that if it had been pointed out to the testator that the income might become deficient, he might have made arrangements of a different kind from those which he has made. We cannot speculate on any of those matters, but we must take the words he has used. If the will had stopped at the end of the direction to pay the annuity, the words would not appear to me, as at present advised, sufficient to constitute a continuing charge upon the income, or a charge upon the *corpus*, for the payment of this £100 a year. I do not mean to say there may not be cases in which a direction to pay out of a recurring income, or out of rents, may not indicate an intention to create a perpetual charge, but taking the words by which this annuity is given, and judging of them alone, I think they amount to nothing more than a direction to pay the annuity out of the income if the income was sufficient. But then come these important words: "*From and after the payment of the said annual sum of* £100, *and subject thereto*, I do hereby declare that my said trustees for the time being shall stand possessed of the said trust moneys, stocks, funds, mortgages, and securities, upon the trusts, and for the ends, intents, and purposes, hereinafter mentioned." There is, therefore, from and after a certain event, or the accomplishment of a certain purpose, a re-vesting, as it were, in the trustees of whatever may be the capital or *corpus* of the trust moneys, stocks, funds, mortgages, and securities, upon and for certain further trusts and purposes, being trusts for the benefit of the members of the testator's family as tenants for life and tenants in remainder. Now the view the Vice-Chancellor has taken of the words, "from and after the payment of the said annual sum of £100, and subject thereto," is that they are merely referential words, and do not in any way alter the construction which the preceding words would have had if standing alone. His

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Honour then, being of opinion that the preceding words, taken by themselves, merely indicated payment out of income if sufficient, considered that no greater effect could be imported into them by the gift over. Now, if I were able to satisfy myself that the words introducing the gift over were merely referential words, I should agree with the construction His Honour has put upon the will, but I cannot satisfy myself that they are merely referential. I think we have no right to curtail the natural meaning of the words, and read "from and after the payment of the said annual sum" as meaning "from and after the chance of payment of the said annual sum, in case the income be sufficient for such payment," or the words "subject thereto," *i.e.*, subject to the payment of the annual sum of £100, as meaning "subject to the payment of the said annual sum if the income be sufficient for such payment." I think the natural meaning of the words "from and after the payment of the said annual sum," is, "from and after full and complete payment of the said annual sum of £100," and the natural meaning of the words "subject thereto," is, "subject to the full and complete payment thereof." If that be so, then there is a fresh trust created in favour of the beneficiaries which does not commence until, and is only created subject to, the full payment of the preceding gift of the annual sum of £100. I, therefore, with great respect to the Vice-Chancellor, cannot agree with the view he has taken of this will, though I should have been very glad if I could have done so, for it is impossible to help feeling a desire to adopt a construction which would give something to every object of the testator's bounty. I think, therefore, the annuitant is entitled to an order establishing her right to be paid the annuity of £100, and the arrears, not merely by the continuing receipt of the income, but by payment out of the *corpus*.

SIR JOHN ROLT, L.J.:—

Having also had the opportunity (of which I have availed myself) of considering out of Court the argument which the counsel for the Appellant addressed to us yesterday, and part of the argument of the leading counsel for one of the Respondents, who commenced his argument yesterday, and of examining all the cases which have

been cited, except the cases of *Perkins* v. *Cooke* (1); *Earle* v. *Bellingham* (2); and *Miller* v. *Huddlestone* (3); which were cited this morning, I also think that the case may now be disposed of.

If an annuity is given out of rents and profits, or dividends and interest, and the capital, or *corpus*, is given intact, from and after the annuitant's death, to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over not "from and after the annuitant's death," but, "from and after satisfaction of the annuity and subject to the annuity," then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate, or of the trust fund. This view of the principle of construction appears to me not to be inconsistent with any one of the cases which have been cited.

Now, in the present case the capital is in terms given "from and after the payment of the said annual sum of £100, and subject thereto." But it is said (and the argument is entitled to great weight) that the words "subject thereto," mean subject to the payment of the annuity out of the income, for that the gift of the annuity in the first place is only out of income, and that the whole capital fund, spoken of as "the said trust moneys," is given over. Even if that be the construction of the gift of the annuity, I doubt whether the conclusion drawn from it is well founded. If an annuity for life be given out of the interest of trust funds only, and then the trust funds are given after and subject to the satisfaction of the annuity, I should prefer the construction which gives the annuitant the benefit of the full payment, if necessary, out of the capital. But is it accurate in this case to say that the annuity is only given out of dividends and interest? I think that is very doubtful. What are the trustees to do with the interest, dividends, and annual proceeds of the trust funds? To levy and raise the annual sum of £100, and then the annual sum thus levied and raised is directed to be paid to the annuitant for life. This, without any violence to the words, admits of a construction which makes the annuity a charge on the *corpus:* for it is not a mere gift out of the income, but a direction to levy and raise out of income

(1) 2 J. & H. 393, (2) 24 Beav. 445,
(3) 3 Mac. & G. 513.

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the sum of £100 a year, and that sum of £100 is to be paid to the annuitant. I am aware that the direction to levy and raise an annuity out of the rents and profits is to be found in some of the cases in which it has been held that the annuity was only charged on the income; but the language of the direction in those cases will be found, in comparison with the words here, not to be nearly so strong in favour of a charge on the *corpus* as the language before us. On the whole, therefore, I think that the annuitant is entitled to be paid out of the capital of the fund, and that the order must be varied in that respect.

Solicitors: Messrs. *Sharp & Ullithorne;* Messrs. *J. & C. Cole;* Messrs. *Swann & Co.;* Mr. *Edwin Smith.*

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Ex parte HEYN. *In re* HEYN.

Bankruptcy Act, 1861, *s.* 159—"*Rash and hazardous Speculation.*"

A merchant, at the end of 1865, held invoices for 800 bales of cotton, of the value of £29,000, for which he had accepted bills. At that time he knew himself to be, if not insolvent, at all events in a critical position, having nothing but the cotton to meet the bills. He stopped payment in June, 1866, and became bankrupt, having in the meantime given or confirmed orders for 1100 more bales of cotton, of the value of £35,000. He had scarcely any assets besides his cotton, which was pledged beyond its value, and his unsecured debts were £58,000:—

Held, that, although dealing in cotton was within the limits of legitimate commerce, still, as such dealing was notoriously hazardous, the bankrupt, having regard to the state of his affairs at the end of 1865, was bound to exercise the greatest caution as to extending his liabilities for cotton, and that the subsequent orders for the 1100 bales, which appeared not to have been requisite for keeping his business together, must be considered as having been given in order to take the chance of a rise in price, with a certainty that the loss, in case of a fall, would have to be borne by his creditors and that this was "rash and hazardous speculation."

An order of the Commissioner, suspending the order of discharge for twelve months, and for six months of that period without protection, was accordingly affirmed.

THE bankrupt and his brother carried on business in *Liverpool*, in partnership as general merchants, from 1855 down to July,

1866. They appeared to have commenced their business with little or no capital, but, until towards the close, they carried it on with reasonable success, and with fair credit. Among other things, they dealt extensively in cotton. About the end of 1865 their affairs were in a critical state, and they were liable on bills of exchange for 800 bales of cotton, worth £29,000, with nothing but the cotton to meet them. During the next six months orders for 1100 more bales of cotton, to the extent of £35,000, were either given, or allowed to continue when liable to be revoked. In the spring of 1866 a fall took place in the price of cotton, to the extent of about £50 per cent. in three months, so as to make the above-mentioned purchases ruinous to persons who had no other resources, the total loss on the cotton being upwards of £30,000. The firm stopped payment in June, 1866, and the bankruptcy took place on the 2nd of October following. The brother absconded, being charged with forgery. There was only about £1500 of assets, besides cotton which was pledged far beyond its value, and the amount of debts, deducting securities, was about £58,000, the total of debts being nearly £70,000. The bankrupts appeared to have carried on their business in cotton during 1866 on much the same scale as previously.

In these circumstances, the Commissioner considered that the insolvency of the firm was in a great measure due to "rash and hazardous speculation," within the meaning of sect. 159 of the *Bankruptcy Act*, 1861, and suspended the bankrupt's order of discharge for twelve months, refusing protection for six months out of that period. The bankrupt appealed, and was examined orally before their Lordships, that fuller information might be obtained as to the dealings of the firm in 1866, than appeared upon the evidence. The facts on which the judgment of the Court proceeded sufficiently appear in the judgment of the Lord Justice *Rolt*, but, for convenience, the above statement of them is given.

Mr. *Jordan*, for the bankrupt, contended that the insolvency of the firm was owing to the fall in the price of cotton, a circumstance over which the bankrupt had no control. He referred to *Ex parte Downham* (1), and *Ex parte Johnstone* (2).

(1) 11 W. R. 577. (2) 4 De G. & Sm. 204.

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Ex parte HEYN. *In re* HEYN.

Mr. *Bacon*, Q.C., and Mr. *Yate Lee*, for the assignees and opposing creditors:—

Cotton, since the commencement of the American war, has fluctuated so much in value, that dealing in it goes to the very verge of legitimate trading, and for any one who has no capital to speculate largely in it is rash and hazardous in the extreme. The whole case is open to us on the appeal, and we contend that the Commissioner's sentence ought to be made more severe. There has been a trading on fictitious capital, and a contracting of debts without reasonable expectation of being able to pay: *Ex parte Harrison* (1).

Mr. *Jordan* in reply:—

There is no ground for saying that there was a trading with fictitious capital. The mere trading without capital is quite a different thing.

July 31. SIR JOHN ROLT, L.J.:—

In this case the Commissioner, in exercise of the powers given by the 159th section of the Act of 1861, has suspended the bankrupt's order of discharge for twelve months, without protection for six months of that period. The appeal is by the bankrupt against that order. The ground of the Commissioner's decision was, that the bankrupt's insolvency was attributable to rash and hazardous speculation. The opposing creditors insist, also, that the bankrupt had carried on trade by means of fictitious capital, and that some of his debts were contracted without any reasonable ground of expectation of being able to pay the same.

The important question, however, will be found to be, was the bankrupt's insolvency attributable to rash and hazardous speculation? The facts are these:—The bankrupt and his brother carried on business at *Liverpool*, in partnership as general merchants. The brother is charged with having committed a forgery, and has absconded. They had been in business as general merchants from 1855, and till the latter part of their partnership they carried on

(1) Law Rep. 2 Ch. 195.

business with credit and reasonable success, though they apparently commenced without capital. They had dealings in cotton, as well as in other commodities, throughout the whole period of their carrying on business; and though their transactions in cotton were large during the last six months of their career, it does not appear that they were larger, or, at all events, materially larger, than they had been in previous corresponding periods. Now trading in cotton, though speculative, is part of the legitimate business of merchants, and the bankrupt's firm carried on their dealings in the article in the usual way. Cotton was ordered within certain limits as to quantity and price, with more or less discretion to the foreign producer or merchant, and was placed for sale in the hands of brokers here, who made advances against it. So far there is nothing which would appear to be rash speculation. All commerce is, in its nature, in some degree speculative, and speculation is hazardous. The offence in the 159th section cannot consist merely of "hazardous speculation." It is obvious that "rash speculation" is of the essence of the case.

But let us look a little more closely at the bankrupt's transactions during the last few months he was in business. At the end of 1865 his firm held invoices for 800 bales of cotton to arrive, of the value of about £29,000, for which they had either accepted, or become liable to accept, bills drawn upon them. The bankrupt admits that the position of his firm was not at the time strong. They had, he says, the value of the cotton with which to meet the bills, but he does not pretend that they had any other resources. In June, 1866, when they stopped payment, they had no assets of any importance beyond their cotton, which was then all pledged far beyond its value, and their debts, uncovered by any security, then amounted to £58,000. My conclusion is, that if there had been a winding up of the firm at the end of 1865, they were then insolvent. But I will take the position from the bankrupt's own language—they were not strong; if solvent, it was all that could be said in their favour. What then was the bankrupt's duty under these circumstances? It must be borne in mind that though their transactions in cotton were within the limits of legitimate commerce, yet that the article was among the most fluctuating in price, and the transactions of the most hazardous nature, of

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any within those limits. The bankrupt was therefore called on to exercise the utmost caution and prudence in extending his liabilities. I do not gather from the evidence that the business was one which required a particular amount of stock to be kept up to meet the requisitions of the customers of the firm, and so to keep their trade together. Whatever was subsequently done was not done under any such necessity, but solely to take the chance of profit to themselves should there be a rise in the market, with the certainty that the loss resulting from any considerable fall would not fall on themselves, but on their creditors.

It is then said for the bankrupt, that his firm gave no new orders in the year 1866. Is this so? The firm in the first three months of 1866 received invoices for 1100 additional bales, the cost price of which was £35,000. And I think it clear that the whole of this had been ordered either at the very end of 1865, or in 1866. The bankrupt states that the 800 bales, the invoices of which had been received in 1865, had been ordered at various dates from six weeks down to a few days before the end of the year. The 1100 bales, the invoices of which were afterwards received, could scarcely have been ordered at an earlier period. It is clear these orders were under the bankrupt's control at the beginning of 1866, and to the extent of 220 bales it is admitted that those orders were given in February of that year. As late as March, 1866, the firm gave orders for altering the limits of the original orders. Under these circumstances, and in the then state of their affairs, I am of opinion that the giving of these orders at the end of 1865 was rash speculation, and not legitimate commerce; and the neglect to countermand these orders during the early part of 1866, a continuance of the same conduct, and that the bankrupt has subjected himself to the consequences of the 159th section of the Act.

If this view be correct, it is difficult to avoid the conclusion also, that some of the debts due from the bankrupt at his bankruptcy were contracted without any reasonable or probable ground of expectation of being able to pay the same. But as any conclusion to be arrived at on this point would not alter my judgment under the circumstances of this case, as to the suspension of the discharge, I will not pursue the inquiry. I do not think the case

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of trading with fictitious capital is made out. Indeed, I share all the difficulties which have been expressed by others as to what trading with fictitious capital means, and it is not in this case necessary to endeavour to unravel the difficulty. On the whole, thinking the bankrupt has clearly brought himself within at least one of the offences enumerated in the 159th section, I am not disposed to differ from the Commissioner as to the consequences that should follow, and I am of opinion that his judgment should be affirmed.

LORD CAIRNS, L.J. :—

I am of the same opinion, and for the same reasons.

Solicitor for the Assignees and Opposing Creditors: Mr. *James Gray*, agent for Mr. *Etty, Liverpool.*

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Ex parte BROADHOUSE. *In re* BROADHOUSE.

Bankruptcy Act, 1861, *s.* 212—*Solicitor's Clerk—Right to appear and plead.*

A Commissioner in bankruptcy is not bound to hear a person who, although a duly admitted solicitor of the Court, does not appear as the solicitor of the party for whom he appears, but only as the clerk of such solicitor.

THIS was an appeal by the bankrupt from a decision of Mr. Commissioner *Sanders* confirming the adjudication.

On the 27th of May, 1867, *Thomas Broadhouse* was adjudicated bankrupt, the act of bankruptcy being a deed of assignment for the benefit of his creditors. *Broadhouse*, on the 29th, gave notice, by Messrs. *Duignan & Lewis*, as his solicitors, of his intention to shew cause against the adjudication, by disputing the act of bankruptcy, and the 3rd of June was appointed for hearing the matter.

On the 3rd of June, Mr. *Dale*, who was a solicitor, not practising on his own account, but employed as the clerk of Messrs. *Duignan & Lewis*, appeared on *Broadhouse's* behalf. Being asked by the

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Commissioner whether he appeared as clerk to Messrs. *Duignan & Lewis,* he replied that he did. Upon which the learned Commissioner refused to hear him, stating that he was entitled to require the attendance of a member of the firm, and would not hear a clerk when the solicitor himself might appear. The case was thereupon adjourned to the 6th, that a member of the firm might appear. On the 5th, Messrs. *Duignan & Lewis* wrote a letter to the Registrar of the Court, which stated that they did not propose to attend personally on the following day, and contained the following passages: "The Commissioner, in refusing to hear Mr. *Dale* on the ground that he is only a clerk, has laid down a rule which, in the interest both of the profession and of the public, we feel bound to resist. . . . He will accordingly attend as our representative on Thursday. He is a solicitor duly admitted in the Court of Bankruptcy, and holding a certificate entitling him to practise. He has, therefore, a statutory right of audience, and if the Commissioner should again refuse to hear him, we shall not hesitate to bring the matter before the Lord Chancellor."

On the 6th of June, accordingly, Mr. *Dale* again appeared for *Broadhouse,* and insisted on his right to be heard, stating that he had signed the roll of solicitors of the Court of Bankruptcy that morning. The learned Commissioner refused to hear him, and stated that he dismissed the application with costs. The bankrupt thereupon said: "I am the bankrupt, and I wish Mr. *Dale* to be heard. It is my wish, I have engaged Mr. *Dale,* he has the whole matter in hand, I wish him to be heard. I thought your Honour would hear him this morning." The Commissioner replied, "I said expressly I would not hear him," and thereupon confirmed the adjudication with costs.

Broadhouse now moved, by way of appeal, that the last-mentioned order might be discharged, and that the adjudication might be annulled, or that he might be at liberty to shew cause against it before the district Court.

Mr. *Kay,* Q.C., and Mr. *Finlay Knight,* for the Appellant:—

Dale was an authorized solicitor of the Court, and as such had a right to be heard, under sect. 212 of the Act of 1861. The principle of a solicitor acting as an advocate is recognised by 12 & 13

Vict. c. 106, s. 247. The schedule to the General Orders in Bankruptcy, of the 19th of November, 1861, recognises agency, and *Dale* here was doing agency business, if, indeed, he ought not to be treated as the solicitor of the bankrupt. At all events, the bankrupt ought not to be sacrificed to the trial of this question, but ought to have an opportunity given him of being heard.

Mr. *De Gex*, Q.C., and Mr. *J. Napier Higgins*, for the petitioning creditor :—

Sect. 212 authorizes a solicitor to appear and plead for his client in bankruptcy, it goes no further, and was not intended to authorize solicitors to practise as advocates for persons who are not their clients. *Dale* was not the bankrupt's solicitor, *Duignan & Lewis* were his solicitors, they would have been the persons liable for costs if the application turned out unfounded: *Ex parte Cuthbert* (1); they would have been the persons liable to the bankrupt if it was dismissed by not being advocated with reasonable skill, and they were the persons who, if the adjudication was annulled, would have a lien for costs. *Dale* was not, and did not profess to be, the bankrupt's solicitor, and he had no right to be heard. The Act 15 & 16 Vict. c. 54, s. 10, expressly negatives advocacy by a solicitor in the County Courts, except on behalf of his own client, and it would be curious if a solicitor might act as advocate in a bankruptcy prosecuted in the Court of Bankruptcy, when he cannot in a bankruptcy in the County Courts. There is no agency here in the technical sense in which the word must be understood as applied to this subject. In *Re Bull* (2) Commissioner *Fonblanque* decided that only the solicitor could be heard. The bankrupt refused an opportunity of being heard, and is not entitled to any indulgence.

Mr. *Kay*, in reply :—

The express prohibition of a solicitor's acting as advocate in the County Courts is in my favour.

LORD CAIRNS, L.J. :—

Two questions arise in this case, one of very considerable general importance, the other of importance to the Appellant only.

(1) 1 Madd. 78. (2) 20 L. T. 24.

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The first question is, whether the Commissioner was bound to hear Mr. *Dale* as the representative or clerk of Messrs. *Duignan & Lewis*, Mr. *Dale* being himself a solicitor of the Court. There can, I think, be no controversy as to the character in which Mr. *Dale* presented himself. Mr. *Dale* clearly, on the evidence before us, went, in the first instance, on the 3rd of June, before the Commissioner, appeared before him, and claimed to be heard before him, as the clerk and representative of Messrs. *Duignan & Lewis*, and that view alone is consistent with their letter of the 5th of June, in which they said, "Mr. *Dale* will accordingly attend as our representative on Thursday." There can be no doubt, therefore, that the state of things at the time of the meeting before the Commissioner, on Thursday, was this: Messrs. *Duignan & Lewis* were the solicitors of Mr. *Broadhouse*, they had given the notice of motion as his solicitors, Mr. *Dale* was not, at that time, the solicitor of Mr. *Broadhouse*, and every person knew that he appeared before the Commissioner only in the character I have described. Upon that state of facts the question of general interest arises, and, in my opinion, the Commissioner was not bound to hear Mr. *Dale*, appearing as the clerk and representative of Messrs. *Duignan & Lewis*, even although Mr. *Dale* was himself a solicitor of the Court. The 212th clause of the *Bankruptcy Act*, 1861, provides that "every solicitor of the High Court of Chancery, now or hereafter admitted as a solicitor of the Court of Bankruptcy, may practise as such solicitor in the said Court, or any district Court, and as to all matters before the Commissioners, or in chambers, may appear and plead without being required to employ counsel." That section, in my opinion, did nothing more than this, it absolved the solicitor from the necessity of appearing by counsel, and authorized him to appear in his own person, but did not, in any way, alter the ordinary character in which alone a solicitor is entitled to appear in any Court, viz., as the solicitor of a particular client. His appearing in that character is the condition of his being heard, and for obvious reasons. The main object of allowing and favouring the appearance of a solicitor as representing another person is, that the Court should have before it a person who, on the one hand, is under an obligation to the Court because he is one of its officers, and, on the other hand, is under an obligation to the

suitor because he is in privity with him, and is the actual person who represents him. Unless that chain of connection is maintained and kept complete, the object of allowing solicitors to appear on behalf of other parties is entirely defeated. I think, therefore, that so long as Mr. *Dale* claimed to be heard, not as the solicitor of Mr. *Broadhouse*, but as the clerk of Messrs. *Duignan & Lewis*, who were the solicitors of Mr. *Broadhouse*, the Commissioner was justified in refusing to hear him. I think there is no foundation for the argument that Mr. *Dale* had a right to be heard on the ground that he was doing "agency" business. He was the agent of Messrs. *Duignan & Lewis* in one sense—in the legal sense in which a servant is the agent of his master, or a clerk is the agent of his employers, but not in the technical sense in which that term is used when solicitors are said to do agency business.

Then arises this further question. The bankrupt was present when the Commissioner refused to hear Mr. *Dale*, but before the proceedings were over (for although the Commissioner had no doubt used words appearing to point to his making an order, I cannot consider the case to have come technically to an end) the bankrupt, who was present, addressed to the Commissioner words which I think were equivocal. They may not, and very probably do not, bear the technical construction that he was thereby terminating *pro hac vice* the employment of Messrs. *Duignan & Lewis*, and retaining Mr. *Dale* as his solicitor, but the words were ambiguous, and I think that the bankrupt ought to have been distinctly apprised by the Commissioner that if he continued to look to Messrs. *Duignan & Lewis* as his solicitors, and to desire to be heard by Mr. *Dale* in no other character than as their clerk, he could not be so heard, that if he did not choose either to have a solicitor or to speak for himself he must take the consequences, but, on the other hand, that if he then and there desired to be represented *pro hac vice* by Mr. *Dale*, Mr. *Dale* being a solicitor of the Court, he was at liberty to place Mr. *Dale* in that new character, which up to that time he had not filled. I do not think it is possible to say what the bankrupt under that state of things would have done, but I think that this would have been the safe course for the Commissioner to have pursued towards him. Although I regret the necessity for it, I think that the matter must go back to the

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Commissioner in order that the bankrupt may be heard, bearing in mind the opinion which I believe my learned brother entertains as well as myself, and which I have expressed, as to the person by means of whom he must be heard.

SIR JOHN ROLT, L.J :—

It might perhaps be possible to dispose of this application without determining the general and somewhat important question whether the clerk of a solicitor, being himself a solicitor, is entitled to appear and plead in the Bankruptcy Court on behalf of his employer's client. For the bankrupt it is contended that the clerk had a statutory right of audience. It appears to me that he had no such statutory right. I think that the question chiefly depends on the 212th section of the Act of 1861, the effect of which is not, I think, varied by the Orders of 1861, or, rather, the 28th of the Orders of 19th of October, 1852, therein referred to. That section, in effect, provides that the solicitor who is entitled to practise as a solicitor in the Court of Bankruptcy, and who does practise as such solicitor, is entitled to appear and plead. Is it a reasonable construction of language to say that the clerk of a solicitor is practising as such solicitor in the Court of Bankruptcy? I think it is not, and I think it was not intended that he should be entitled to appear and plead. Then it is said that the practice as to agents will allow the clerk of a solicitor, being himself a solicitor, to appear and act as an agent. I think that this argument, also, cannot be maintained. It is not necessary at all to determine whether there is any objection to a solicitor employing another solicitor in the same town or city, say *London*, for instance, to appear as his agent in common law matters or bankruptcy matters. There can be no doubt at all that either one solicitor may employ another solicitor as such agent, although in the same town, or they may be both on the record, and may appear as joint solicitors, but that does not apply to an individual only retained and employed, but not placed on the record, nor named in the proceedings, and does not constitute him agent in the technical sense which is well known in the profession. I think, therefore, that it is impossible to justify that which is insisted on by Messrs. *Duignan & Lewis*,

and by Mr. *Dale*, their clerk, as to the right of Mr. *Dale* to appear and be heard in Court.

Then there remains the question, what, under the circumstances of the case, would have been the proper order to be made. Mr. *Broadhouse*, the bankrupt, at the end of the examination, said, "I am the bankrupt, and I wish Mr. *Dale* to be heard. It is my wish." And after that he says, "I have engaged Mr. *Dale*, he has the whole matter in hand. I wish him to be heard." After he had said that (and very little was said beyond that) was it right that the order should be pronounced, that the adjudication of bankruptcy should be confirmed? I think it is impossible for us to say that that was the right course to take under those circumstances. There either might have been more distinct information given to Mr. *Broadhouse* as to the result and consequence of his adhering to what he had expressed, or the Commissioner might have adjourned the case to another day, saying to the bankrupt, "In the meantime you had better consider whether you will not appear by some other person. The Court is quite willing to give you an opportunity of being heard, but you must be heard according to the rules and practice of the Court." But summarily to say in effect, "We confirm the adjudication; you are a bankrupt, and there is an end of the matter," was, I think, a stronger measure against the bankrupt than the occasion justified. I think, therefore, that the order should be discharged, but it does not appear to me that it is a case for any costs.

Solicitor for Mr. *Broadhouse*: Mr. *W. H. Duignan.*

For the Petitioning Creditor: Mr. *A. D. Smith*, agent for Messrs. *Southall & Nelson, Birmingham.*

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Ex parte THE BANK OF ENGLAND. *In re* PRICE.

Creditors' Deed—Order for transfer of Stock—Bankruptcy Act, 1849, *ss.* 128, 141—*Bankruptcy Act*, 1861, *s.* 197.

3C&601
4QB378

A debtor executed a deed vesting all his property in trustees, to be applied for the benefit of his creditors, in like manner as if he had been adjudged bankrupt. The deed was duly registered. Shortly afterwards he died, leaving a sum of bank stock standing in his name, and there was no personal representative:—

Held, that, in the case of bankruptcy, the Court could have made an order under the Bankruptcy Act, 1849, s. 128, directing the bank to transfer the stock into the names of the assignees, without the bankrupt or his personal representative signing a transfer; that the *Bankruptcy Act*, 1861, s. 197, gave the trustees of such a deed as the present the same rights in this respect as if they had been assignees in bankruptcy; and that an order might be made upon the bank for transfer into the names of the trustees, upon which the bank could act without the concurrence of a personal representative.

THIS was an appeal motion from an order of Mr. Commissioner *Winslow*.

On the 25th of June, 1866, Sir *C. R. Price* and *J. Marryat* executed a deed of assignment for the benefit of their creditors in the following form:—

"This deed, made the 25th day of June, 1866, between Sir *Charles R. Price*, Bart., and *Jos. Marryat* of, &c., bankers and partners, of the one part, and *W. E. Eddison* and *R. C. Price* on behalf of and with the assent of the joint and separate creditors of the said Sir *C. R. Price* and *J. Marryat* of the other part, witnesseth that the said Sir *C. R. Price* and *J. Marryat* hereby convey all their joint and separate estate and effects to the said *W. E. Eddison* and *R. C. Price* absolutely; to be applied and administered for the benefit of the creditors of the said Sir *C. R. Price* and *J. Marryat* in like manner as if the said Sir *C. R. Price* and *J. Marryat* had been at the date hereof duly adjudged bankrupts: And in consideration of the premises, each of the creditors of the said Sir *C. R. Price* and *J. Marryat*, or of either of them, doth by these presents release the said Sir *C. R. Price* and *J. Marryat*, and each of them, from his and their re-

spective debts, in like manner as if the said Sir *C. R. Price* and *J. Marryat* had obtained a discharge in bankruptcy."

This deed was duly registered under sect. 192 of the *Bankruptcy Act*, 1861.

Shortly after the execution of the deed Sir *C. R. Price* died, having £500 bank stock standing in his name. He had no legal personal representative.

The charter of the *Bank of England* prescribed, as to the transfer of bank stock, "That the method and manner of making all assignments and transfers of the said capital stock and yearly fond, or any part thereof, shall be by an entry in the said book or books, signed by the party so assigning or transferring, in the words or to the effect following, viz.: 'Memorandum: That I, *A. B.* the day of , in the year of our Lord , do assign and transfer of my interest in the capital stock and fund of the governor and company of the *Bank of England*, and all benefits arising thereby, unto , his heirs and assigns. Witness my hand.' Or, in case the person assigning be not personally present" [here followed a provision as to transfer by power of attorney]. "Under which transfer the person or persons, bodies public or corporate, to whom such assignment or transfer shall be made, or some other person by him or them lawfully authorized thereunto, shall sign his or their name or names, attesting that he or they do freely and voluntarily accept of the same."

On the 16th of May, 1867, Mr. Commissioner *Winslow*, after full discussion upon a notice of motion served on the *Bank of England*, made an order, "That the governor and directors of the *Bank of England*, by themselves or their officers, do assign and transfer by entry in the books kept by them for that purpose, the sum of £500 stock of the Governor and Company of the *Bank of England* now standing in the name of the late Sir *C. R. Price*, the debtor, into the names of *W. E. Eddison* and *R. C. Price*, the trustees of the said deed, or that the said governor and directors do consent to allow such assignment or transfer to be made by the said trustees themselves."

The bank applied to discharge this order, and the appeal motion came on before the Lords Justices on the 14th of June,

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when it stood over, that it might be considered whether it would not be desirable to have clauses to meet such cases introduced into the Bankruptcy Bill then before Parliament. It now came on again to be disposed of.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, for the *Bank of England* :—

The question turns on the construction of sect. 128 of the *Bankruptcy Act* of 1849, and sect. 197 of the *Bankruptcy Act*, 1861. We submit that the 128th section does not do away with the necessity of a transfer signed by the bankrupt, the words "all persons &c," including the bankrupt himself. But if the present order could be made in the case of bankruptcy, it does not follow that it can in the present case. We contend that the latter Act does not import into composition deeds all the statutory provisions as to the effect of a bankruptcy upon the debtor's property, but only makes the Court of Bankruptcy the tribunal for deciding all questions as to the administration of the debtor's estate under the deed. The exception, "except so far as the deed shall provide otherwise," shews that it was not intended to give creditors' deeds the same effect as a bankruptcy. *Re Smyth's Settlement* (1), and *Green* v. *Bank of England* (2), shew how strict a construction is to be put on clauses such as sect. 128 of the Act of 1849. It is most important that the books of the bank should be kept correctly, according to the regulations of their charter, and the Court will not, unless the statutes be clear, hold them to authorize a transfer in a mode inconsistent with the plain directions of the charter. The trustees might get a decree establishing their title to this stock, and then the *Trustee Act*, 1850, would apply.

Mr. *De Gex*, Q.C., for the trustees :—

I contend, first, that if this had been a bankruptcy, then sect. 141 of the Act of 1849 would have, *ipso facto*, vested this stock in the assignees as part of the bankrupt's personal estate, and that this enactment is not to be shorn of its effect by the bank charter and the Act confirming it. The assignees take the property just as executors or administrators do; and sect. 128 of the same Act

(1) 4 De G. & Sm. 499. (2) 3 Y. & C. Ex. 722.

obliges the bank to dispense with the form of transfer required in ordinary cases. Sect. 197 of the Act of 1861, places the trustees of such a deed as the present in the same position as assignees in bankruptcy. The deed is a complete *cessio bonorum*, and provides expressly that the bankrupt law shall be applicable; it is in substance a deed in the form mentioned in sect. 200. The 197th section gives the trustees "the same rights" with respect to the collection of the assets as assignees would have, and it is every day's practice for trustees under these deeds to sue in their own names for debts due to the debtor before the assignment.

Mr. *Cotton*, in reply:—

We contend that assignees in bankruptcy are not, by the Act of 1849, placed in the same position as executors with respect to funds transferable by entry in the books of the bank. The statute 36 Geo. 3, c. 90, s. 2, was clear in dispensing with a transfer by the bankrupt, but this was repealed by 6 Geo. 4, c. 16, and a clause much less clear, 6 Geo. 4, c. 16, s. 80, substituted for it. The 128th clause of the Act of 1849 is the same as this later clause. The case very seldom occurs of a bankrupt having bank stock or consols standing in his name; but in every case in which it has occurred the bankrupt has joined in transferring the stock. The *Trustee Act* contains an express provision enabling the officer of the bank to act as a sort of parliamentary attorney of the bankrupt; but there is nothing of that kind in the clause in question. The 128th section of the Act of 1849 contemplates the interference of the Court, but if Mr. *De Gex's* argument on the effect of sect. 141 is well founded, sect. 128 is wholly superfluous.

The right of suing for debts in the names of the assignees is given by express words in sect. 141, which was borrowed from 6 Geo. 4, c. 16, s. 63, thus shewing that the assignment by the Commissioner, which was then in use, had, *per se*, only the effect of an ordinary deed. That section vests the right in the assignees for the time being; is it contended that stock in the books of the bank is to go over *ipso facto* on every fresh appointment of trustees of a creditors' deed? The enactments as to copyholds shew that the spirit of the *Bankrupt Act* was to interfere as little as possible with peculiar modes of transferring property. As

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regards the alleged practice for trustees of these deeds to sue for debts in their own names, it goes for very little, there not being a single decision that such a form of action is correct.

July 22. LORD CAIRNS, L.J.:—

In this case Sir *Charles Price* was possessed of a sum of £500 bank stock, standing in his own name. On the 25th of June, 1866, he and his partner, Mr. *Marryat,* executed a deed for the benefit of their creditors, by which they conveyed all their joint and separate estate and effects to *Eddison* and *Price* absolutely, to be applied and administered for the benefit of the creditors of Sir *Charles Price* and Mr. *Marryat* in like manner as if they had been at the date thereof duly adjudicated bankrupts. There was, therefore, the most absolute conveyance which the debtors could make, and a conveyance by reference to bankruptcy, which shews the extent to which the conveyance was intended to go. The clause in the Act of 1861, which declares the effect of a deed of that kind, is the 197th, which, so far as applicable to the present case, is as follows: "From and after the registration of every such deed" the trustees and the creditors under the same "shall, as between themselves respectively, and as between themselves and the debtor, and against third persons, have the same powers, rights, and remedies with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed, or may be used or exercised, by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy; and, except where the deed shall expressly provide otherwise, the Court . . . shall have power to make and enforce all such orders as it would be authorized to do if the debtor in such deed had been adjudged bankrupt, and his estate were administered in bankruptcy." It appears to me, therefore, that in the case of a deed of this kind, conveying the whole of the property of the debtor, conveying it especially by reference to what would be the effect in bankruptcy, the clause that I have read makes the trustees of the deed as fully and completely masters of the property, with all the incidents attaching to that ownership, as if the debtor had actually become a bankrupt. We must, therefore, for the purpose of determining

the rights of the parties as to the bank stock which I have mentioned, see what the rights of the trustees would have been had they been assignees in bankruptcy.

The effect of bankruptcy for this purpose is to be discovered from the Act of 1849. The 141st section of that Act provides that "When any person shall have been adjudged a bankrupt, all his personal estate and effects, present and future, wheresoever the same may be found or known . . . and all debts due or to be due to him, wheresoever the same may be found or known, and the property, right, and interest in such debts, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt, by virtue of their appointment." Now, stopping there, the result would have been, that if Sir *Charles Price* had become a bankrupt, the bank stock, as part of his property, would have vested absolutely in the assignees. They would have been the owners and the proprietors of the bank stock, with all the powers of disposition incident to ownership and proprietorship. But this bank stock is registered in the books of the Governor and Company of the *Bank of England*, and by their charter and statute the mode of transferring such stock in their books is by an entry made by the governor and company, after a transfer in a particular form has been made by the person in whose name the stock was standing. That is what is to be required in every case, except certain cases which I put out of consideration, the cases of succession in testacy and intestacy, and the case of marriage. If, therefore, the Act of 1849 had gone no further than the section which I have mentioned, the bank, upon the assignees in bankruptcy requiring the bank stock of the bankrupt to be transferred into their names without any transfer by the bankrupt, might well have said, "We have by charter and Act of Parliament a particular mode prescribed for the transfer of bank stock; we recognise no other mode. We cannot take out of the name in our books in which it is standing the bank stock which you require us to transfer—we cannot do so, because it is contrary to our rule, and, moreover, it would not be fair for you to call upon us to take the responsibility of acting on the assumption that these bankruptcy proceedings cannot be successfully impeached for irregularity or otherwise, and we therefore decline to make the transfer." It was, I appre-

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hend, to meet a view of that kind that the 128th section was inserted in the Act of 1849:—[His Lordship read the section.] This section gives the Court of Bankruptcy power to make an order directing the Governor and Company of the *Bank of England*, being persons whose act is necessary to the transfer, to make the transfer into the name of the assignees, and to pay all dividends upon the same to the official assignee, and gives an indemnity to the bank acting upon such order. I think, therefore, that in the case of bankruptcy it is quite clear that the assignees, having by statute the whole interest in the stock vested in them, might apply to the Court for an order directing the bank to make the formal transfer, and that the Court might make that order. It was said that the proper meaning of this clause, and the meaning that it has received in practice (although we have had no distinct evidence with regard to the practice) was, that the bankrupt was to execute a transfer, and that the order was to be upon the bank to act upon that transfer. But it seems to me that such a construction would make the enactment superfluous, because if the bankrupt executed the transfer there could be no difficulty in the bank acting upon it with the concurrence of the assignees, and the bank, I apprehend, if it had refused to act upon it, would have been compelled to do so, irrespective of the 128th section. I therefore think that the obvious meaning of the Act was, to require the bank to make, and to indemnify the bank for making, the transfer into the name of the assignees upon the statutory vesting in those assignees of the ownership of the stock. Now, the effect of the deed, and the rights of the trustees under the deed, have to be measured by the rule and law of bankruptcy, and the rule and law of bankruptcy would, in my opinion, require the bank to act upon an order of the Court, and would justify an order of the Court directing the transfer. I therefore think that the Court of Bankruptcy had authority to make the order now under appeal.

In point of form, however, the order appears to me not to be perfectly regular. The point is not, perhaps, of much importance, the only substantial question before us having been, whether the Court had authority to make any such order; but I apprehend that the proper form of the order would be simply to direct the Governor and Company of the *Bank of England* to do and consent

to all acts necessary for transferring the stock into the name of the trustees of the deed. This appears to be the form, according to the words of the statute.

The *Bank of England* have acted quite properly in bringing the case before this Court, in order to obtain our decision upon a point which has created difficulty; but we must throw no doubt at all upon the jurisdiction of the Court, and we cannot do otherwise (and I do not suppose that the bank desire us to do otherwise) than dismiss the appeal with costs.

SIR JOHN ROLT, L.J.:—

I am of the same opinion, and for the same reasons.

I am anxious, however, that it should not be supposed that the very ingenious arguments urged on behalf of the *Bank of England*, founded upon the terms of the bank charter, and on the provisions of the present and former Bankrupt Acts, have been overlooked. But the general scope and spirit of that portion of the Act of 1861 which relates to trust deeds for the benefit of creditors, and the strict and literal construction of the 128th and 141st sections of the Act of 1849, and the 197th section of the Act of 1861, are, in my judgment, much too clear to be controlled by reference to the other Acts of Parliament and to the bank charter.

Mr. *Cotton* then asked, whether it was meant by their Lordships that the bank should alter their books, so as to place the stock in the names of the trustees of the deed, without any assignment or transfer being executed by anybody, observing, that if the trustees had been executors, they would have had a power to transfer; but the stock would not have been placed in their names, unless they made a transfer to themselves.

LORD CAIRNS, L.J.:—

We think that questions of that kind are altogether superseded by the Act, which, as we read it, requires the bank to transfer the £500 bank stock into the names of the trustees, and makes the order of the Court an indemnity to them for doing so.

L. JJ. 1867 *Ex parte* THE BANK OF ENGLAND. *In re* PRICE.

The order accordingly directed the Governor and Company of the *Bank of England* to do and consent to all acts necessary for transferring the stock into the names of the trustees of the deed.

Solicitors for the *Bank of England:* Messrs. *Freshfields & Newman.*
Solicitors for the Trustees: Messrs. *Lawrance, Plews, & Boyer.*

L. JJ. 1867 *July* 23.

Ex parte GLEN. *In re* GLEN.

Bankruptcy Act, 1861, *s.* 192—*Arrangement between Debtor and his separate Creditors only.*

A person who carried on business in partnership executed a composition deed for the benefit of his separate creditors only, which was assented to by the requisite statutory majority of separate creditors. The firm was also indebted:—

Held, that the deed was not binding on a dissenting separate creditor, for that a deed providing for one class of creditors only is not within s. 192 of the *Bankruptcy Act*, 1861.

THIS was an appeal from a decision of the *Liverpool* District Court of Bankruptcy, allowing a separate creditor of *G. G. Glen* to issue execution on a judgment obtained against him.

By indenture, dated the 24th of January, 1867, expressed to be made between *Glen* of the one part, and his separate creditors of the other part, reciting that *Glen* was indebted to his creditors in divers sums of money which he was unable to pay, and had proposed to pay to them, and they had agreed to accept, a composition of 2*s.* in the pound on the amount of, and in discharge of, their respective claims, payable in manner hereinafter appearing, *Glen* covenanted with each of them, the said creditors, and their respective executors and administrators, that the deed should be registered under sect. 192 of the *Bankruptcy Act*, 1861, and that immediately after such registration, *Glen* would pay to each of his said creditors the sum of 2*s.* in the pound on the amount of their respective debts or claims which would have been proveable against his estate if he had been adjudicated bankrupt on the date of the deed. It was further witnessed, that the creditors and each of them released *Glen*, his heirs,

executors, and administrators, of and from all and all manner of debts, actions, suits, causes of action and suit, damages, claims, and demands whatsoever, which they, the releasing parties respectively, then had, or at any time thereafter could, should, or might have, or be entitled to, from or against *Glen*, his heirs, executors, or administrators, for any cause, matter, or thing, previous to the date thereof. The deed provided that none of the said creditors should be prejudiced or affected, as to his or their rights or remedies against any person or persons other than *Glen*, or as to any security or securities held by him, her, or them, or any property not belonging to the estate of *Glen*, by executing, or assenting to, or approving of the deed, or by the same being obligatory on him, her, or them. And it was provided that each creditor, for the purposes of the composition, should be accounted a creditor only in respect of the balance appearing due to him after deducting the value of the property comprised in any security which he might hold on any part of the real and personal estate of *Glen*.

This deed was assented to by a majority in number, representing three-fourths in value, of the separate creditors of *Glen*, and was registered under sect. 192 of the *Bankruptcy Act*, 1861.

Glen, at the time of the execution of this deed, carried on business in partnership with *John Wild*, and the firm were indebted to a larger amount than they were able to pay.

A separate creditor of *Glen*, who had obtained judgment against him, applied under sect. 198 for leave to issue execution, on the ground that the deed was not binding on non-assenting creditors, being made, not with all the creditors, but only with the separate creditors, and leave to issue execution was given by the Registrar. *Glen* appealed.

Mr. *Kay*, Q.C., and Mr. *Robinson*, for the appeal:—

We submit that this deed is good under sect. 192. The deed there mentioned is to be between the debtor and his creditors, or "any of them," which latter words will be satisfied by holding them to apply to such a case as this. The creditors to have the benefit of it are the creditors who could prove if the debtor were made bankrupt: *Wood* v. *De Mattos* (1) Now, joint creditors

(1) Law Rep. 1 Ex. 91.

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would not have any effectual right of proof under the debtor's bankruptcy. Suppose the deed had been a *cessio bonorum* for the separate creditors, to be administered as in bankruptcy, no separate creditor could complain, for he would get the same benefit exactly as in bankruptcy. But there is nothing in the Act to warrant treating a *cessio bonorum* differently, as to its effect in binding dissentient creditors, from a composition deed. If this decision is reversed, it will be impossible for a debtor who is a partner ever to make any arrangement with his separate creditors.

[*European Central Railway Company* v. *Westall* (1) was also referred to.]

Mr. *Druce*, Q.C., and Mr. *Yate Lee*, for the Respondent, were not called upon, but referred to *Re Oldfield* (2).

LORD CAIRNS, L.J.:—

The question raised in this case is a very important one; and if we were to take a view contrary to that taken by the Registrar, I am afraid the consequences would be very serious. The power given by sect. 192 to the majority of the creditors is extremely large; and, though the Court is bound to give full effect to the provisions of that section, it must take care that those provisions are not stretched beyond their words or spirit. Sect. 192 and the sections immediately following it, apply to mere deeds of composition, as well as to deeds in which there is a *cessio bonorum*, and we cannot put a construction upon them which would give them one effect in the case of a composition deed, and another effect in the case of a deed containing a *cessio bonorum*, at all events with respect to the binding non-assenting creditors. The debtor was a partner; he had joint creditors and separate creditors. Now, sect. 192 *primâ facie* makes no difference between these classes; it speaks generally of a deed entered into between the debtor and his creditors, or any of them. The words, "or any of them," have been observed upon, but their meaning is obvious. The section contemplates, as parties to the deed, either all the creditors, or some of them, as trustees for, or as representing, the whole body of creditors. But to render the deed binding there must be an

(1) Law Rep. 1 Q. B. 167. (2) 11 L. T. (N. S.) 756.

assenting majority in number, representing three-fourths in value, of the creditors whose debts amount to £10 and upwards—that is, all the creditors need not be parties to the deed, but there must be the requisite majority approving of it; and, according to the natural construction of the section, it must be a deed of which the benefit will enure to all the creditors generally. The consequence of holding that a deed made for the benefit of the separate creditors only is binding upon the non-assenting minority of them would be this, that whereas, but for the deed, they would be entitled to sue the debtor, and take out execution, and avail themselves of all other advantages which their diligence might procure for them, they would, in consequence of the deed, have their hands tied, and be unable to pursue their remedies, while the joint creditors would be perfectly free. The result might be, that the whole separate estate might be swept away by the joint creditors, the separate creditors losing the benefit of their legal remedies, without obtaining anything in return. That would be so in the case of a deed containing a *cessio bonorum*, and if the deed were a mere composition deed, a similar consequence would follow in a less direct way—the debtor on whose exertions the payment of the composition depends, might have the means of carrying on his business taken away by the joint creditors. It is, however, enough to say that the construction contended for on behalf of the Appellant is not warranted by the words of sect. 192. I think that the order of the Registrar is right, and that the appeal ought to be dismissed with costs.

SIR JOHN ROLT, L.J.:—

I am unable to understand how there can be, under the Act, a deed having the effect of binding some of the dissentient creditors without binding them all. There is no authority for holding sect. 192 and the following sections to give a deed such an effect; and the consequences of such a construction, which does not give to the word "creditors" its natural meaning, would be very serious. A *cessio bonorum* for the separate creditors would prevent their pursuing their legal remedies, though everything which the deed gave them might be swept away by the joint creditors, who would be wholly unfettered. In the case of a composition deed with the

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separate creditors, there would also be an injury to the non-assenting separate creditors—what guarantee would there be for the payment of the instalments when the joint creditors were at liberty to make the debtor a bankrupt, or to take away all his property by means of executions, the joint creditors being left at liberty and the separate creditors not? It seems to me, therefore, that, in the absence of express words in the Act to justify the construction contended for, it is impossible to hold this deed valid; and I think that the order of the Registrar was entirely right.

Solicitors for the Appellants: Messrs. *Field, Roscoe, & Co.*
Solicitors for the Respondents: Messrs. *J. T. & R. Gole.*

L. JJ. 1867 June 13, 27; July 29.

In re BARNED'S BANKING COMPANY.

PEEL'S CASE.

Companies Act, 1862, s. 18—*Alteration in Memorandum after Signature—Effect of Certificate of Registration—Variance between Prospectus and Memorandum—Delay.*

5 Eq 256 — 432
6 Eq 206
3 H & M 340, 359
4 Ch 138 — 180,
7 Eq 163-4,
5 Ch 375,
PC 357.
14 W R 613.

The memorandum of association of a company when brought to the office of the Registrar of Joint Stock Companies for registration, was objected to by him as going beyond the prospectus, whereupon the bearer of it then and there, without any communication with the persons who had signed it, made alterations to remove the objections of the Registrar, who at once registered it in the altered form:—

Held, that although the conduct of the Registrar, in knowingly registering a document which had been thus altered, was most censurable, the company was duly constituted, the certificate of registration being, under sect. 18 of the *Companies Act*, 1862, conclusive evidence that the requisitions of the Act had been complied with:

Held, that a person who, before the registration of a company, applies for shares on the faith of a prospectus, ought to be treated as having become aware of any variations between the prospectus and memorandum at the earliest practicable time.

Order of the Master of the Rolls affirmed.

THIS was an appeal motion, by Mr. *William Peel*, to discharge an order of the Master of the Rolls refusing to rectify the register of shareholders of *Barned's Banking Company, Limited*, by removing the Appellant's name therefrom.

The prospectus issued before registration of the company contained the following passages:—

"This company is formed for the purpose of purchasing the business of the old established and well known private bank of Messrs. *I. Barned & Co.*, in *Liverpool*, and organizing it on the broader basis of a joint stock company, under the *Limited Liability Act.*

"The bank, which was founded in 1809, has done a large and continually increasing business, and there is no doubt that in its new and extended form still more satisfactory results will be realized."

The prospectus then stated the purchase-money to be given for the business of the bank, and proceeded:—

"Copies of the company's memorandum and articles of association, and of the agreement for the transfer of Messrs. *I. Barned & Co.'s* business, can be seen at the offices of the solicitors of the company."

The company was registered on 27th of June, 1865, with a memorandum, the third clause of which was as follows:—

"The objects for which the company is established are the acquisition, under an agreement of the 15th of June, 1865, of the banking business of *I. Barned & Co.*, the carrying on in *Liverpool*, and such other places, both in *Great Britain* and abroad, as the company from time to time think fit, of the business of bankers, bill brokers, and general agents, in all their branches, the amalgamating with or purchasing the business of any company, partnership, or firm; the drawing, accepting, discounting, and dealing in bills, exchanges, specie, real and personal securities, and all other representatives of value; the carrying on the business of any firm with a view to the profitable winding up of their estate, the receiving deposits of money and valuables, the procuring and making loans, the investing money, the transaction of every description of financial business, and the doing of all such [other] things [as the company from time to time consider to be] incidental or conducive to the attainment of any of the above objects [or otherwise for the benefit of the company]."

Mr. *Peel* applied for 100 shares on the 27th of June, 1865 (the day of the registration of the company), and eighty were allotted

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to him on the 18th of July. He paid £100 deposit on application, made it up to £5 per share on allotment, was registered as member, and paid £5 more per share in September, as required by the prospectus, and in February, 1866, he received a dividend. No certificate for shares was, however, delivered to him.

The company stopped payment on the 23rd of April, 1866, and on the 8th of May, 1866, a winding-up order was made. Mr. *Peel*, on the 26th of January, 1867, took out a summons to have his name removed from the register, on the ground of variance between the prospectus and the memorandum. In support of his application he deposed as follows:—

"In the full belief that the statements in the prospectus were true, and that the above-named company was formed for the purpose of purchasing and carrying on the business of the private bank of Messrs. *I. Barned & Co.*, in *Liverpool*, as a joint stock company, with limited liability, as stated in the said prospectus, and for no other purpose, I filled up and signed the said form of application for shares, sent to me with the said prospectus, for 100 shares, and sent the same accordingly.

"At the time I applied for the said shares I had not seen the memorandum of association, or the articles of association of the company, nor any copy thereof, and I did not know the contents of the said memorandum or articles, and I did not know or believe, and I had no reason to suppose, that the said company was formed for any other purpose than that of purchasing and carrying on as a joint stock company, with limited liability, the business of the private bank of Messrs. *I. Barned & Co.*, in *Liverpool*, or that any other business than that of banking in *Liverpool* was carried on, or was intended to be carried on, by the said company."

Mr. *Peel* went on to depose that, until after 21st of December, 1866, he had no knowledge or belief, or reason to suppose, that the objects for which the company was established were more extensive than, or in any way different from, the objects or purpose stated in the prospectus.

On the 12th of February, 1867, the Master of the Rolls dismissed the summons, with costs.

After this it was discovered that the memorandum of association, after being signed, had been altered by striking out several words.

The alterations so made are indicated by brackets in the statement above. A clerk in the office of the Registrar of Joint Stock Companies deposed that it had been so altered on the day of registration, in consequence of the Registrar refusing to register it unless those alterations were made. In consequence of which, Mr. *Bolton*, the person who brought it to the office, made the alterations at the time, and gave back the altered memorandum for registration. Mr. *Bolton*, who had been the attesting witness to the signatures affixed to the memorandum, confirmed the above statement. It was not alleged that any of the seven persons who had signed the memorandum gave any authority to make the alterations, and five of them deposed that they had neither authorized, assented to, nor adopted them.

Sir *Roundell Palmer*, Q.C., and Mr. *Bush*, for the appeal motion:—

We contend that this case is governed by *Ship's Case* (1); and *Stewart's Case* (2).

[The LORD JUSTICE LORD CAIRNS:—How long do you say that the shareholder is to be at liberty to go on without looking at the memorandum and articles, and then repudiate his shares because the memorandum goes beyond the prospectus?]

What is a reasonable time must depend upon the circumstances of each case. He must be at liberty to repudiate until after the Court can infer as a matter of fact, or as a presumption of law, that he knew the contents of the memorandum and articles. Here we submit there is no sufficient ground for imputing such knowledge. The alteration in the memorandum after it had been signed made the instrument void, and the company never was duly registered. Mr. *Peel*, therefore, cannot be a contributory, for, in fact, there never was a company.

Mr. *Selwyn*, Q.C., and Mr. *Kekewich*, for the official liquidator:—

If the registration be invalid, the company is one with unlimited liability. At all events, so long as the winding-up order stands, the Appellant cannot be heard to say that there was no company.

(1) 2 D. J. & S. 544. 11 Jur. N.S. 230 (2) Law Rep. 1 Ch. 574. 12 Jur. N.S. 755

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The alteration made was not such a substantial alteration as to avoid the contract, it was one on which the Registrar might with propriety insist. *Felgate's Case* (1) is distinguishable, for there the alteration was secret and material. Here it is on the face of the instrument, and immaterial. *Richmond and Painter's Case* (2) shews that persons who took shares with the memorandum in its present state cannot complain, however the persons who signed the memorandum may be entitled to do so. The 18th section of the Act is, however, decisive, for it makes the certificate of registration conclusive evidence that the requisitions of the statute have been complied with, and the Court cannot regard the alteration. Taking the memorandum in its present form, it does not, on a fair construction, taking all the parts of it together, go beyond the prospectus. But suppose it does, Mr. *Peel* is barred by delay: *Lawrence's Case* and *Kincaid's Case* (3).

[*Henderson* v. *Royal British Bank* (4), and *Davidson* v. *Cooper* (5), were also referred to.]

Mr. *Bush*, in reply:—

Mr. *Peel* cannot be liable as a member of an unlimited company, for he never agreed to become a member of anything but a duly constituted limited company. In this case, the real memorandum required by the 11th section never was registered. The 18th section cannot mean more than that the certificate shall be conclusive evidence that the requisites of the office have been complied with. The Court can then look at the alteration, it is clearly material, and vitiates the instrument: *Sheppard's* Touchstone (6). As regards delay, Mr. *Peel* had no means of knowing the alteration, and he would not, by going to the office, have discovered the fact that it was made without authority. As regards the variation from the prospectus, I submit that no delay is attributable to him. It cannot, on sound principle, be held that he was bound to go and look at the memorandum and articles; he was entitled to assume that the directors had done their duty, and registered a memorandum and articles which were conformable to

(1) 2 D. J. & S. 456. 11 Jur. N.S. 552
(2) 4 K. & J. 305.
(3) Law Rep. 2 Ch. 412.
(4) 7 E. & B. 356, 364; 3 Jur. N.S. 111
(5) 11 M. & W. 778; 13 Ibid. 343.
(6) Page 69.

the prospectus. In *Lawrence's Case* and *Kincaid's Case* (1), there was unreasonable delay after actual discovery of the variance.

July 29. The case was now put in the paper to be disposed of by the Lord Justice Lord *Cairns* alone.

LORD CAIRNS, L.J.:—

There were two questions argued in this case. First, whether the Appellant, Mr. *Peel*, was entitled to have his name taken off the list of contributories, upon the ground that a material alteration had been made in the memorandum of association after it had been executed by the original subscribers to it, and before it was registered. And, secondly, whether he was so entitled on the ground that there was a variance between the memorandum of association, as regards the objects of the company, and the prospectus which had been previously issued, and upon the faith of which Mr. *Peel* took the shares.

The first of these questions was not, as I understand, argued in the Court below. The way in which that alteration came to be made is extremely singular. I am told that something similar has occurred in other cases, but I think this is the first time that anything like it has been presented to the judicial notice of the Court. The narrative is best taken from the short affidavit of Mr. *Betty*, who says: "I was, on the 27th day of June, 1865, and I still am, a clerk in the office of the Registrar of Joint Stock Companies in *Serjeants' Inn, Fleet Street*, in the city of *London*. On the 27th of June, 1865, a memorandum of association of the above-named company was tendered to me at the office of the Registrar of Joint Stock Companies for registration. I altered the memorandum of association by striking out, or obliterating in pencil, the words, 'other,' 'as the company from time to time consider to be,' and, 'or otherwise for the benefit of the company,' in the last three lines of the third paragraph of the memorandum of association, and I thereupon submitted the same, so altered, to the Registrar, who required the same to be altered in accordance with the said pencil alterations, and refused to register the same

(1) Law Rep. 2 Ch. 412.

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unless such alterations were made. I then handed back the memorandum of association to the person who had tendered the same for registration, and informed him, as the fact was, and is, that the said Registrar refused to register the memorandum of association unless the aforesaid alterations were made therein. That person was, as I have since learned, *Hugh Bolton*, the witness who attested the several signatures to the memorandum of association. The said *Hugh Bolton* thereupon, and on the said 27th of June, 1865, altered the memorandum of association by striking out and obliterating with ink the aforesaid words, which had been previously struck out by me in pencil. The words so struck out in ink are shewn in the paper writing produced to me at the time of swearing this affidavit, and marked B, such words being therein struck out in red ink. On the 27th of June, 1865, Mr. *Bolton* left with me the memorandum of association for registration as so altered, and the same was so registered accordingly, with the Registrar of Joint Stock Companies, on the same day." The result of that operation was, that while the memorandum of association, as it originally stood, pointed out as the business of the company various things which the company were entitled to do, and ended thus, "the doing of all such other things as the company from time to time consider to be incidental or conducive to the attainment of any of the above objects, or otherwise for the benefit of the company," it became, by its alteration, limited to "the transaction of every description of financial business, and the doing of all such things incidental or conducive to the attainment of any of the above objects," only. The difference, of course, between the two was of the most serious and substantial kind.

Now, I do not know that it would have been necessary to have observed further upon the circumstance that this alteration was made in the way described by the affidavit I have read, had it not been that, in the course of the argument before the late Lord Justice and myself, it was contended, perhaps without sufficient consideration, that the Registrar did a very wise and proper thing in making this alteration. I, on the contrary, think that his conduct was in the very highest degree censurable. A document which was required by Act of Parliament to be executed by not less than seven

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persons subscribing their names to it, and which formed the whole foundation and basis of a company, was brought in the ordinary way to the Registrar for registration. The Registrar thought that it was too wide in its terms, and I entirely agree in that opinion. The objection was a very proper one for the Registrar to make, but the making of the objection should have been followed by a demand that the document should be taken back, and after having been either completely re-drawn or altered, should be re-executed by the persons who had originally executed it, and then, and not till then, should it have been received for registration. As it was, this solemn and important document was altered in the office of the Registrar, with the consent of his deputy, and apparently not without the sanction of himself, altered so as, in fact, to substitute for it a document materially different, the execution attached to the former document in its original shape appearing to be an execution of the document in its altered state. So far as the original parties to the document were concerned, and so far as the document should be looked at up to the point of its registration, in my opinion the alteration so made entirely neutralised and annihilated the original execution and signature of the document.

That, however, is not the question with which I have now to deal. I have to decide what the effect of this alteration is, having regard to the 18th section of the *Companies Act*, 1862. This section provides, among other things, that "A certificate of the incorporation of any company, given by the Registrar, shall be conclusive evidence that all the requisitions of this Act in respect of registration, have been complied with." The certificate was given in this case in due form. Now, as I understand the objection of Mr. *Peel*, it is, that the requisitions of the Act in respect of registration have not been complied with, and that his name ought, therefore, to be taken off the list of contributories. But, according to the Act of Parliament, the certificate of incorporation given by the Registrar is not merely a *primâ facie* answer, but a conclusive answer, to any such objection, and, as it seems to me, not only is that the express provision of the Act of Parliament, but there is sufficient reason for such a provision. Parliament requires, for obvious purposes of public policy, that a company of this description should begin by seven or more persons subscribing

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a memorandum which is to be registered; and when once the memorandum is registered, and the company is held out to the world as a company undertaking business, willing to receive shareholders, and ready to contract engagements, then it would be of most disastrous consequence if, after all that had been done, any person was allowed to go back and enter into an examination (it might be years after the company had commenced trade) of the circumstances attending the original registration, and the regularity of the execution of the document originally received by the Registrar. The Registrar, if he performs his duty carefully, will be the guardian of the public interest, by seeing that the memorandum is properly executed and properly brought for registration; but, whether he does so or not, when once the certificate of incorporation is given, nothing is to be inquired into as to the regularity of the prior proceedings. Of course that is quite consistent with the persons who were parties to the original memorandum, and executed it, retaining entirely intact any right which they may have against the Registrar, or any other persons, if a document executed by them in one form comes afterwards to be registered in another form, through having been altered without their sanction; but it is not necessary to express any opinion on the present occasion whether their legal rights remain entire, notwithstanding the 18th section. I think, therefore, that the case of Mr. *Peel*, to have his name taken off the list on the first ground, fails.

I now come to the second ground, namely, the alleged variation between the prospectus and the memorandum of association, as regards the objects for which the company was to be incorporated. The prospectus, which was headed "*Barned's Banking Company, Limited,*" stated as follows:—[His Lordship read the parts of the prospectus which are stated above.] When the memorandum was registered the purposes of the company that were specified in it were these:—[His Lordship read the 3rd clause of the memorandum.] So far as the prospectus is concerned there is no purpose indicated but this, that the company was to take over the business of *Barned's Banking Company*, and that *Barned's Banking Company* was to be reorganized on the broader basis of a joint stock company; a confident expectation being expressed that more satisfactory results would be realized by the company in its new

and extended form. On the one hand, no doubt, the whole is called a banking company; on the other hand, there is a statement that the organization of the new company was to be, in some way or other, upon a broader and more extended basis than the former. Several of the matters mentioned in the memorandum of association seem to me to fall clearly within the general denomination of the business of a banker. That business, as we all know, is of a very elastic kind. Some bankers, in conducting their business, undertake to do a great many more matters for their customers than other bankers will do. If it were necessary to determine whether this memorandum of association, in strictness, goes beyond the prospectus, it would be, of course, obligatory on the Court to go through each head mentioned in the memorandum, and weigh carefully the words which are used. I think it better, however, for the purpose now in view, to assume, for the benefit of the Appellant, that the memorandum of association goes beyond the prospectus; and that upon consulting the memorandum of association, immediately after he had sent in his application for shares (if, indeed, he could not have consulted it before, which may be a matter of doubt), he might have drawn back from the application and refused to accept the shares. Let us then consider how the facts stand. The prospectus had certainly prepared him for finding that the new incorporated company was to be on a broader and more extended basis than that of *Barned's Banking Company.* He, on the 27th of June, 1865, sent in his application for shares, and sent it in upon the footing of the prospectus. The prospectus told him that copies of the memorandum and articles of association could be seen at the office of the solicitors of the company; and by his application he undertook to pay calls thereon, and to accept the shares he asked for, subject to the provisions of the *Companies Act,* 1862, and of the articles of association. In point of fact, the memorandum and the articles were dated the 26th of June, and were registered the very day upon which he sent in his application for shares. He therefore might have seen, as the prospectus said, the memorandum and articles of association on the very day he sent in his application; or, if there be any question about the fractions of a day, he certainly might have seen them immediately afterwards. [His Lordship then stated the subsequent facts.]

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PEEL'S CASE.

I do not think it necessary to repeat here what I have said in several cases that have come before this Court during the last year, particularly in *Lawrence's Case* and *Kincaid's Case* (1). I held in those cases that where the memorandum of association goes beyond the prospectus, and where, therefore, it is in the power of the applicant for shares either to decline to accede to the memorandum or to agree to such enlarged memorandum, then, even if there has not been a memorandum in existence at the time when he applies for his shares, it is his bounden duty, at the earliest practicable moment, to ascertain what is the charter or title deed under which the company in which he has agreed to become a shareholder is carrying on business. If the memorandum and articles of association are in existence when he applies for shares, and if he agrees to take his shares on the footing of the memorandum and articles of association (which would seem to be the case here), then I think that he ought to be held bound to look to the memorandum and articles of association before he applies for shares. But where the memorandum and articles of association are not in existence at the time of application, I think that, at the very latest, when he receives his allotment of shares, he ought to satisfy himself that there is nothing in the memorandum or articles of association to which he desires to make any objection; and not having done that, I think it is much too late to come, as Mr. *Peel* comes, considerably more than a year after the allotment, to examine, for the first time, the memorandum of association for the purpose of seeing whether there can be any objection sustained to it, on the ground that it goes beyond the prospectus on the faith of which he took his shares.

I ought to observe that the Master of the Rolls appears to have entertained an opinion that it would be a sufficient answer to Mr. *Peel's* application to say, that in point of fact although the memorandum went beyond the prospectus, yet the company did not carry on any business under what I may term the larger powers in the memorandum, but only carried on the business of the original banking company. I do not think that this would be a sufficient answer to the case of Mr. *Peel*, if otherwise well founded, because it is clear that although they did not carry on a larger

(1) Law Rep. 2 Ch. 412.

business, they might afterwards have availed themselves of the wider and larger terms of the memorandum.

On the other ground, that Mr. *Peel*, if he ever had a right to object to the memorandum, certainly comes too late to object to it now, I think that the order of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

Solicitors for the Official Liquidator: Messrs. *Freshfields & Newman.*

Solicitors for Mr. *Peel*: Messrs. *Pattison & Wigg.*

In re NATIONAL AND PROVINCIAL MARINE INSURANCE COMPANY.

Ex parte PARKER.

Companies Act, 1862, *s.* 35—*Rectification of Register—Transfer to escape Liability—Jurisdiction of Court.*

In adjudicating on an application under sect. 35 of the *Companies Act*, 1862, a Court of equity is not bound to follow what a Court of law would do in such a case, but will take into consideration any principle of equity applicable to the subject.

The articles of a company provided that on proof of title and execution of transfer, the company should register the transferee, but that no transfer of shares should be made or registered after a call on such shares had been made until payment thereof. At a meeting of the board of directors the propriety of making a call was discussed. A shareholder present induced the directors to postpone consideration of the matter, and then, without informing them of his intention, transferred his shares to a pauper in order to escape all further liability. The directors having declined to register the transfer:—

Held, that the Court would not, under sect. 35 of the *Companies Act*, 1862, rectify the register by removing the name of the transferor, and substituting that of the transferee.

Semble, in a case of doubt the Court may, instead of adjudicating between a company and a person claiming to be registered as a shareholder under sect. 35 of the *Companies Act*, 1862, direct a suit to be instituted for the purpose of determining the rights of the parties.

THIS was an appeal from a decision of the Master of the Rolls, who had refused an application made to him to rectify the register

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of the *National and Provincial Marine Insurance Company*, by removing therefrom the names of *J. Heald*, *W. Mathwin*, and *J. T. Hoyle*, and inserting that of *Thomas Parker*, the transferee of their respective shares. *Heald*, *Mathwin*, and *Hoyle* were respectively the registered owners of 500, 88, and 10 shares in the company. On the 20th of April, 1867, each of them executed a transfer of his shares to *Parker*, in consideration of 5*s.* paid to them by him, and *Parker* executed the transfers at the same time. On the 22nd of April the transfers by *Heald* and *Mathwin* were presented to the company for registration, and that by *Hoyle* was presented on the following day.

By the articles of association it was provided that shares might be transferred by deed executed by the transferor and transferee; that the transferor should remain the holder till the name of the transferee was entered on the register; and that on the transfer being executed and presented to the company, along with such evidence as to the title of the transferor, and of the execution of the transfer by him, as the board might require, the company should register the transferee as a member. It was also provided (clause 28) that the board might decline to register the transfer of any share made by a member indebted to the company; and (clause 29) that no transfer, unless with the previous consent of the board, should be made or registered after a call on such shares had been made, until the amount of such call, together with the amount of all overdue calls, if any, upon all other shares of the transferor, and the amount of all interest, if any, in respect of such overdue calls, should have been first paid to the company, and that notwithstanding the time appointed for payment of the calls should not have arrived; but the last-mentioned provision was not to apply to any transfer which might have been actually lodged at the office previously to the call being made.

On the 23rd of April a call was made by the company. All previous calls had been paid by *Heald*, *Mathwin*, and *Hoyle*. The company (which had not been ordered to be wound up) having declined to register the transfers, *Parker* applied to the Court, under the 35th section of the *Companies Act*, 1862, to rectify the register as above-mentioned. Upon the occasion of this application, *Parker*, *Heald*, and *Hoyle* were cross-examined in Court.

From such cross-examination it appeared that the company had its head office in *London;* that *Heald, Mathwin,* and *Hoyle* lived in *Newcastle-upon-Tyne,* where there was a considerable number of shareholders; that *Heald* was regarded as the representative of the *Newcastle* shareholders, and, although not a director, was permitted to attend the board meetings. On the 17th of April, 1867, there was a board meeting, at which *Heald* was present, and he deposed with respect to the proceedings as follows:—"Upon my seeing the chairman, he suggested that it was proper to make a call before the business commenced, and, being a stranger to the state of the company at that time, not having been at the meetings for some time, I suggested that they should go through the routine business, and discuss the call afterwards." This course was accordingly adopted, and subsequently the chairman proposed that a call should be made. Some discussion followed, and ultimately no resolution was come to. *Heald* gave the following account of the transactions: "I said that if they made a call I should have to call a meeting and see the *Newcastle* shareholders upon it, and discuss with them what action should be taken. Then, when the directors subsequently determined to continue the business, I was asked to say nothing about it: they said they were going to see the success of the company during the summer months, and they wanted me to keep quiet." Immediately after this meeting *Heald* returned to *Newcastle,* and saw *Mathwin* and *Hoyle,* who, along with him, resolved to get rid of their shares. *Hoyle,* who was a solicitor, was instructed to dispose of them. As the shares were not saleable, *Hoyle* applied to *Parker,* who was a person of no means, to become the purchaser of them. *Parker* accordingly agreed to become the purchaser of them at the price of 5*s.,* which he paid to *Hoyle,* and the transaction was carried out by means of the transfers above mentioned. *Heald* and *Hoyle* admitted that their object in transferring the shares was to escape from further liability in respect of the shares, but they denied, and it was not contended by the company, that they intended to reserve to themselves any benefit in event of the shares becoming valuable.

The Master of the Rolls refused the application, holding that an inherent discretion was vested in the directors of a company, upon facts such as those of the present case becoming known to them, to

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refuse to register the transfers of shares, and that they were not compelled to register transfers solely effected for the purpose of evading liability. (24 W. R. 215)

From this decision *Parker* appealed.

Mr. *Roxburgh*, Q.C., and Mr. *W. R. Ellis*, for the Appellant:—

We admit that *Parker* is a man of straw, and that the transfers were made for the purpose of escaping liability on the shares. The sole question is, are these transfers valid, notwithstanding that the transferee is a man of straw? We submit that the holder of shares in a joint stock company has an absolute right to transfer his shares, even to a pauper, unless there is something to the contrary in the articles of association: *Libri's Case* (1); *Jessopp's Case* (2); *De Pass's Case* (3); *Hyam's Case* (4); *Chinnock's Case* (5); *Costello's Case* (6); *Slater's Case* (7). Upon these authorities Mr. *Parker* ought to be placed on the register, the transfers to him being without any reservation of benefit to the transferors, and there being nothing in the articles of association of this company to prevent the transfer.

Mr. *Jessel*, Q.C. (Mr. *W. W. Mackeson* with him), for the company:—

This is the first time that the Court has been called upon to aid in completing a transfer made for the purpose of escaping liability. In all the cases which have been cited the transfer was complete; the name of the transferee had been put on the register, and the question was, whether the transaction was valid. The Court has, under these circumstances, held that, there being no bill to impeach the transaction, it must stand. Here the Court is asked to compel the company to complete the transaction. Now, the remedy given by sect. 35 of the *Companies Act*, 1862, is discretionary: *Ward and Henry's Case* (8). In truth, it comes in the place of a mandamus, and the same rules govern it as apply to the granting of a mandamus. This is not a case in which the Court

(1) 30 L. T. 185.
(2) 2 De G. & J. 638.
(3) 4 Ibid. 544. 5 Jur. N. S. 1193
(4) 1 D. F. & J. 75. 6 Jur. N. S. 181.
(5) Joh. 714.
(6) 2 D. F. & J. 302. 6 Jur. N. S. 112
(7) 35 Beav. 391.
(8) Law Rep. 2 Ch. 431.

will exercise its discretion against the company. [He then proceeded to read the cross-examination before the Master of the Rolls, upon doing which he was stopped by the Court.]

The LORD JUSTICE ROLT:—Mr. *Roxburgh*, I think I ought to call upon you. I see nothing unreasonable in the doctrine of *De Pass's Case*, that if a shareholder of a company is minded to get rid of his shares he may do so; but I wish to hear you on two points: first, whether the Court has a discretion under the 35th section of the Act; and secondly, whether, if it has, Mr. *Heald* has in perfect good faith transferred these shares in such a way as to induce the Court to be active in his favour.

Mr. *Roxburgh*:—I submit that in a case between a shareholder and the company the Court has no discretion. It has been decided that if two persons claim the same shares, and an application is made to the Court, then there is a discretion: *Ward and Henry's Case* (1); but there is no case in which it is laid down that this section is discretionary as between a person claiming to be put on or taken off the register and the company. As against the company, a shareholder has a statutory right, conferred by this section, to the assistance of the Court. If not, what remedy has a shareholder? He cannot file a bill, because the answer to that would be, that he ought to have applied under the section. Suppose he applies under the section, and is directed to file a bill, twelve months may elapse before the suit is heard, and the consequences of that delay may be most serious, and many difficulties may arise. Who, for example, is to pay the calls in the meantime? There can be no application for a mandamus. The Courts were empowered under the old Acts to grant that writ, but these Acts are now all repealed.

If reliance is placed on the use of the word "may" in the 35th section instead of "shall," it is sufficient to refer to *Bowes* v. *Hope Life Assurance Company* (2), where it was held that under the words of the 79th section, "a company may be wound up," a creditor had an absolute right, under proper circumstances, to have the company wound up.

(1) Law Rep. 2 Ch. 431.

(2) 11 H. L. C. 389. 11 Jur. N.S. 643.

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The section applies equally to Courts of common law and to Courts of equity. Those whom a Court of law would hold to be shareholders a Court of equity must also hold to be such. A Court of law has no power to decree specific performance, or to order a bill to be filed for that purpose. It is empowered by the last clause of the section to direct an issue, but no corresponding power is conferred on a Court of equity, which therefore cannot refuse to decide on the question.

As to Mr. *Heald*, I start with the proposition that he had a perfect right to deal with his shares as he pleased. He was at liberty to transfer them to escape liability. The very time when a person, having such a right, is most likely to wish to exercise it, is when a liability is impending. Unless, then, it can be said that *Heald* ought to have told the directors that if a call were made he would sell his shares, it cannot be said that he has done anything improper in transferring them.

Sir John Rolt, L.J.:—

I am still inclined to think that the transfer of shares expressly to escape the liability of a shareholder, so far as it is right to express any opinion upon it in this case, does not necessarily vitiate the transfer; and I should not dispose of this case adversely to the Appellant upon any such ground.

16 Eq 561.

I think, also, that probably Mr. *Roxburgh* has been successful in shewing that the decision in *Ward and Henry's Case* does not determine that this is purely a discretionary jurisdiction which the Court is at liberty to exercise or not, as it thinks fit. But I think, so far as I find it necessary to form an opinion upon it, that if a very doubtful case were presented, and the Court thought that upon the whole a bill had better be filed, it would be entitled to say so under the 35th section, and that the difficulties arising from the delay pointed out by Mr. *Roxburgh* would not be a sufficient reason to induce the Court to dispose of the matter upon an application such as this. I think the Court would have jurisdiction to say, "Let a bill be filed, or take such other remedy as you think fit." If that be not so, still I am by no means satisfied that Mr. *Parker* is improperly omitted from this register. In determining that question I am at liberty to take into account every equitable

consideration that bears upon it. Sitting here, and acting under this section, I am not bound to follow what a Court of law would do in such a case. On the contrary, I am not only at liberty, but bound, to take into consideration every principle that is entertained by Courts of equity applicable to any such subject.

Now, in this case, I think Mr. *Mathwin*, Mr. *Heald*, and Mr. *Hoyle*, must stand or fall together. Mr. *Hoyle* acted for them all. Mr. *Heald* held 500 shares out of the 598; and the part which he took, on the 17th of April, in *London*, I think, makes them all liable to stand or fall together. Mr. *Heald* is not a director. He lives at *Newcastle*, and there are *Newcastle* shareholders. He knows the time the directors meet in *London*. He is allowed to attend the board; he is known to represent the *Newcastle* shareholders, and has every information given him as to what is intended to be done by the directors. He attended a board meeting on the 17th of April; and he tells us in his cross-examination as follows:—[His Lordship read the passages set out above, and continued:—]

I think the effect of that is clearly this: the directors were going to proceed to make a call; he attended the meeting, and said: "Transact the other business you have; I am a large shareholder; do not make a call just now; postpone it; if not I will see the *Newcastle* shareholders;" and he led them to believe that there was no intention on his part on that day, or the next, to do something which would put an end to his liability. I think that is fairly to be inferred against him upon this evidence; and that being so, immediately afterwards he goes down to *Newcastle*, is in communication with Mr. *Hoyle*, and on the 20th he effects a transfer, and sends it in on the 22nd, *Hoyle's* being sent in on the 23rd. On the same day, the 23rd (for there cannot be fractions of a day) the call is made. Now, the onus is upon Mr. *Heald*, and those who are associated with him, to shew that the name of Mr. *Parker* is improperly omitted, because the directors did not register these transfers made on the 20th of April. If, after the part he took on the 17th of April, he asks me to say that it is just and equitable that this transfer should be made as against the directors, my opinion is that it is not just and equitable; and if this evidence, and no more, were before me, upon a bill filed by him to do what he is now asking the Court to do, I should not

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be disposed to give him the relief that he asks. No doubt this is a very important case, and one of very considerable difficulty, and if it is intended to make anything of it a bill must be filed. But as the case now stands I think it would not be just and equitable to compel the directors to accept these transfers. Therefore I think the decision of the Master of the Rolls is right, and this appeal must be dismissed, with costs.

Solicitors for *Parker:* Messrs. *Hill & Hoyle,* agents for Mr. *J. T. Hoyle, Newcastle-upon-Tyne.*

Solicitors for the Company: Messrs. *Sewell & Edwards.*

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In re LAMA COAL COMPANY. *Ex parte* MILLER.

Companies Act, 1862, *s.* 159—*Voluntary Winding-up—General Meeting—Compromise of Claim.*

A claim, made against a company which was in course of voluntary winding up, was submitted to the Court for adjudication. After some proceedings towards obtaining such adjudication had taken place, an agreement for compromise was come to between the claimant and the liquidator, subject to the sanction of a general meeting. A general meeting, under sect. 159 of the Act, sanctioned the compromise by a large majority; but some contributories strongly opposing its being carried into effect, the liquidator applied to the Court for directions. The Master of the Rolls was of opinion that although the compromise had been sanctioned by the general meeting, the Court was bound to look to its propriety, and his Lordship, not being satisfied of its propriety, refused to make any order:—

Held, that as the Court, although the winding-up was purely voluntary, had seisin of this particular claim, it would not, without considering the propriety of the compromise, order it to be carried into effect because it had been sanctioned by a general meeting, but that such sanction was an important element in judging of its propriety.

Per Rolt, L.J.:—The sanction of a general meeting is sufficient to throw on the parties objecting to the compromise the onus of shewing that it is unreasonable.

THIS was a motion by Mr. *Miller,* a creditor of the *Lama (Italian) Coal Company, Limited,* by way of appeal from a decision of the Master of the Rolls, who had declined to make an order

sanctioning an agreement which had been entered into for compromising his claim.

The company was formed for working coal mines in *Italy*, under certain concessions acquired by Mr. *Miller*, who sold them to the company. The capital was £15,000, divided into 1500 shares of £10. When the company had been formed, *Miller*, who resided at *Leghorn*, acted as their general agent, and he claimed £3946 as due to him from the company on the balance of his account.

The company was now in course of being wound up voluntarily under a resolution of the 4th of September, 1866, confirmed on the 27th of the same month.

On the 7th of November, 1866, the solicitors of Mr. *Darke*, and Mr. *Greenway*, two of the contributories, wrote a letter to the solicitor of the liquidator, asking him not to decide on Mr. *Miller's* claim except under the direction of the Court, and stating that unless he would undertake to act under the directions of the Court they should apply to have the winding-up continued under supervision. On the following day the solicitor of the liquidator replied as follows:—

"Having submitted to the liquidator your letter to me of yesterday's date, I am authorized to state that Mr. *Miller's* claim will not be gone into by the liquidator except under the directions of the Court, for which purpose he has given me instructions to apply, in the first instance, under the 138th section, and this I will proceed to do."

On the 28th of November, accordingly, the liquidator took out a summons from the Chambers of the Master of the Rolls, calling upon Mr. *Miller* to shew cause why his claim should not be adjudicated upon by the Court, or otherwise dealt with as the Court should direct. *Miller* attended the summons, and it was arranged that he should file a consent to the claim being adjudicated upon by the Court, and such consent accordingly was filed. *Miller* then filed an affidavit in support of his claim, and was cross-examined upon it at considerable length before a Special Examiner on the 18th and 19th of December. Before the cross-examination had been completed, the liquidator came to the conclusion that a

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compromise was desirable, and accordingly entered into a provisional agreement for a compromise, subject to the sanction of an extraordinary general meeting. The terms were, that the company should pay *Miller* £2500, and make over to him its property in *Italy*; but out of the above sum £1427 was to be paid to the creditors of the company, and the liquidator was to see that it was so paid before handing over the surplus. *Miller* was also to indemnify the company against any other debts it might owe. As regarded the property in *Italy* which was to be made over to him, he subsequently offered to let the company retain it at the valuation of £500, but this offer was declined. The sum ultimately to become payable to him under the compromise was therefore estimated at somewhat less than £1600.

On the 5th of February, 1867, an extraordinary general meeting was held for the purpose of considering the proposed compromise. Eighteen out of the twenty shareholders in the company attended, and sixteen of these, holding in all 1049 shares, 400 of which were held by *Miller* himself, voted for the compromise, and only two, Mr *Darke* and Mr. *Greenway*, holding in all 121 shares, voted against it.

Mr. *Darke*, one of these two dissentients, having threatened to take proceedings to set aside the original agreement between the company and *Miller*, the liquidator, on the 15th of February, 1867, took out a summons, which was served on *Miller*, *Darke*, and *Greenway*, to shew cause why the agreement for compromise should not be carried into effect, and why the necessary calls for that purpose should not be made, and, if necessary, be enforced by order of the Court upon the shareholders.

The Master of the Rolls held that as *Miller's* claim had been submitted to the Court, the Court could not allow it to be compromised without satisfying itself that the compromise was a proper one; and not being so satisfied His Lordship refused to make any order. *Miller* appealed.

Mr. *Fry*, for the Appellant:—

I submit that, on an application by the liquidator under sect. 138, where the compromise has been confirmed under sect. 159, the only question which the Court can consider is, whether it was

duly confirmed, and that the Court cannot enter into the question whether it is proper, as if it had been made in a winding-up under the direction of the Court. There is, moreover, no evidence to shew that it is an unreasonable compromise, and the Court will attend to the wishes of the great majority of the contributories.

The *Solicitor-General* (Mr. *Selwyn*), and Mr. *Fooks*, for the liquidator:—

The liquidator considers this compromise advantageous to the company. *Miller* gives up more than half his claim, and we get rid of a litigation which, owing to the necessity of obtaining evidence from *Italy*, would be ruinously expensive.

Mr. *Lascelles*, for the dissenting shareholders:—

The Court has jurisdiction over this claim which has been submitted to it. The claim, therefore, could not be compromised without the sanction of the Court, and the Court will see to the propriety of the compromise. It is not shewn to be proper, and we object that the claim is founded on a contract not binding on the company, and liable to be set aside *in toto*.

Mr. *Fry*, in reply:—

The assent of the liquidator to submit this claim to the adjudication of the Court cannot deprive the shareholders of their right to sanction a compromise of it, irrespective of the Court.

LORD CAIRNS, L.J.:—

The question which we have now to decide is, whether, having regard to the 159th section of the *Companies Act* of 1862, and to the fact that the compromise now in question has been sanctioned by a resolution of an extraordinary meeting of the company, that compromise ought to be carried into effect. The facts necessary to be stated, in order to answer that question, are simply these:—The company is being wound up voluntarily. Mr. *Miller*, the claimant, is the person who originally sold to the company the mining property in *Italy*, in respect of which the company was started. Mr. *Miller* had a pecuniary claim against the company, amounting to £3946. Mr. *Darke*, one of the shareholders of the

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company, being of opinion that this claim was one which should be disputed, gave notice, through his solicitors, to the liquidator that he desired the liquidator not to accede to it. The solicitor of the liquidator, in answer, by a letter of the 8th of November, 1866, promised that the liquidator would not enter upon the claim of Mr. *Miller*, except under the order of the Court, and stated that they had instructions for that purpose to apply to the Court under the 138th section. In pursuance of this undertaking the liquidator took out a summons, dated the 28th of November, calling on Mr. *Miller* to shew cause why his claim should not be adjudicated upon by the Court, or otherwise dealt with or disposed of as the Court should direct. That summons came on to be heard, and it was said that, without the consent of Mr. *Miller*, the Court had not authority to adjudicate upon his claim. A consent, accordingly, was required from Mr. *Miller* and was given. An affidavit was filed by Mr. *Miller* upon which he was cross-examined. This cross-examination went on for two days, after which the official liquidator, being advised by his counsel, and being himself of opinion, that a compromise was desirable, resolved to enter into one, and accordingly signed an agreement for a compromise, subject to the approbation of a general meeting. A general meeting was called for the purpose. The compromise was submitted to them, and was approved of by a large majority. Under those circumstances I am unable to go with the argument that the Court had nothing to do with the propriety of the compromise. I think that as the Court, although it had not possession of the general winding-up, had seisin of this particular claim of Mr. *Miller* for the purpose of adjudication, it was not competent for the liquidator to enter into the compromise on his own authority, without the sanction of the Court; and that the Court is entitled to be satisfied whether the compromise is an expedient one for the company. So far I entirely agree with the conclusion at which the Master of the Rolls arrived.

Then arises the question, whether there is enough to satisfy the Court that this is a reasonable compromise. The facts as regards that question stand thus: In the first place the liquidator, who is intimately acquainted with the concerns of the company as they appear upon all the papers which have come into his hands, and

who has, with perfect *bona fides*, as far as we can judge, entered upon the litigation of this claim, and prosecuted it to the cross-examination of Mr. *Miller*, is of opinion that this is a desirable compromise. In addition to that, although there may be disputes as to the precise amount of the various items of the claim of Mr. *Miller*, it is not disputed that he has a substantial claim against the company. It is, therefore, clear that inasmuch as his claim is, to a great extent, composed of items having relation to the management of the affairs of the company of which he was the agent in *Italy*, a litigation as to the details of his claim must involve a collection of evidence, not in this country, but in *Italy*, and perhaps the adduction of evidence from *Italy* into this country, which must be a long and very expensive process. In addition to that we have what, I think, must be looked upon as a most important piece of evidence, the fact that at a general meeting, called to consider this compromise, eighteen shareholders out of the twenty shareholders of whom the company consists were present, and that sixteen of those, representing 1049 shares, approved of the compromise, those who voted against it holding only 121 shares. It is true that Mr. *Miller* himself holds about 400 shares; but even leaving these out of the account, there is an enormous majority, and the only suggestion as to the remaining shareholders who composed the majority is, that some of them are near relations of Mr. *Miller*, or connected with him in business. It is not, however, suggested that they were trustees for him, or that the shares which they held were in reality the shares of Mr. *Miller*, and I do not see anything whatever to disentitle them to the right to exercise their judgment in regard to this compromise, and to have it said that their judgment is the judgment of *bonâ fide* and independent shareholders.

But there is a further circumstance of great importance with regard to this meeting. The minority of shareholders, representing 121 shares, proposed an amendment; but it was not an amendment disapproving of the compromise as an injudicious compromise, but an amendment going to this, that the original contract between Mr. *Miller* and the company ought to be impeached, from which, of course, it would logically follow that no compromise ought to be made. Now, there is no proposal before us following up this

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amendment that the contract should be impeached, nor has any proceeding been taken for the purpose of impeaching it. I find, therefore, that a large majority of the shareholders approved of the compromise, and that the minority were not exercising their judgment upon the question, whether it was judicious or not, assuming there to be a contract, but were anxious that the contract *in toto* should be disputed:—[His Lordship then proceeded to shew that one of the terms of the compromise which at first sight required explanation, was no real ground of objection to it.]

Those considerations satisfy me that there is a *primâ facie* case made out in favour of the compromise. In my opinion it would be quite open to the opposing shareholders to displace that *primâ facie* case if they were prepared to do so, but having heard what Mr. *Lascelles* urged on their behalf, I find that they are not prepared to shew that this compromise, *primâ facie* appearing desirable, is really undesirable, but that they require the proceedings to go on, and the claim of Mr. *Miller* to be made the subject of judicial determination. That is equivalent to saying, not that this compromise is inexpedient, but that there ought to be no compromise at all, for it would be too late after a judicial determination of the claim to enter into any compromise. The time during which you must agree with your adversary is while you are in the way with him; when once you and your adversary go before the Judge for the purpose of the Judge settling what is right or wrong, the compromise comes too late. I think, therefore, that nothing whatever has been adduced to displace the case made in favour of this compromise, and that directions ought to be given for carrying it into effect.

SIR JOHN ROLT, L.J.:—

The first question is the construction of the 138th and 159th sections of the *Companies Act*, 1862, as applied to the facts before the Court, which on this part of the case are these:—[His Lordship stated the facts.]

It was contended on behalf of Mr. *Miller* that it was competent to the liquidator, under the 159th section, in a purely voluntary winding-up, to make, with the sanction of an extraordinary resolution of the company, any such arrangement as that now in question,

and that the Court had no power to inquire into the prudence or propriety of it, or to do anything more than to see that the meeting at which the extraordinary resolution was passed had been duly convened and held, and the resolution duly agreed to. On the other hand, it was contended that under the 138th section any contributory might open the whole question, and have Mr. *Miller's* claim and all the facts of the case examined, and the propriety of the compromise determined exactly as if the company were being wound up by, or subject to the supervision of, the Court, and as if there had been no resolution of an extraordinary general meeting approving of the agreement.

I am not able to adopt either of these views of the Act as applied to this case. It is not necessary to say what would be the construction of the sections in question in the mere case of an agreement come to under the 159th section in a voluntary winding-up, and confirmed by the resolution of an extraordinary general meeting. But where, as here, the question was substantially before the Court at the very time the meeting was held and the resolution agreed to, I think the Court is not limited to the mere duty of seeing whether the general meeting was duly held and the resolution duly passed. It appears to me, however, that some weight must be given to the resolution, and I think the right course to take in such a case is, not to call on the liquidator or the creditor to go into the whole case and support the agreement, as the Court would have required them to do if the winding-up had been subject to supervision, but to throw the onus of impeaching the agreement, or of shewing that it was unreasonable and unfair, on the contributory.

Then, have Mr. *Darke* and the gentlemen associated with him shewn this in the present case? I think not. The original constitution of the company, and the *bona fides* of Mr. *Miller* in the part he took in the formation of it, are not impeached. The specific items complained of in Mr. *Miller's* account, are a sum of £269 for interest, and £600 for salary, which, if entirely disallowed, would still leave his claim upwards of £3000. But it is objected that a sum of £2500 had been expended on a paraffin distillery not within the legitimate business of the company, and that Mr. *Miller* was in some way responsible for this expenditure.

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It must, however, be borne in mind, that Mr. *Darke* was throughout the whole period of the existence of the company one of its directors, and there is certainly nothing to shew that this sum was so clearly a liability of Mr. *Miller's* that it must be deducted from his claim in considering any question of compromise with him.

I think no weight is due to the relations stated in Mr. *Darke's* affidavit to exist between Mr. *Miller* and the other shareholders who supported the resolution. Those shareholders are nevertheless entitled to vote, and excluding Mr. *Miller's* shares, and the shares said to be held in trust for him, there is still a large majority in favour of the resolution.

Under these circumstances, the agreement thus sanctioned provides for payment to Mr. *Miller* of a sum of £2500, and for making over to him the property in *Italy*, which he has offered to give up for £500, an offer which has been declined; and it must therefore be taken that the total value of what he thus receives is £3000. Out of this sum the official liquidator is himself to pay, or to see duly paid, before he hands over the surplus to Mr. *Miller*, the sum of £1427 to creditors, leaving to Mr. *Miller*, therefore, the sum of about £1600. He is also to indemnify the company against any other possible debts; but this may be thrown out of account.

It is to be observed also, that the official liquidator, who has had the whole case before him, thinks the agreement is beneficial to the shareholders.

Can it be said that the dissatisfied contributories have shewn that there was anything (I will not say corrupt, but) unreasonable or unfair in such an agreement, or that it is one as to which the majority of shareholders at an extraordinary general meeting, having regard to the 159th section, ought not to bind the minority? I think not. It was, as it appears to me, a fit case for compromise, and the result of the compromise is to give Mr. *Miller* less than half his claim. On the whole, therefore, I think that the proper course is, that the official liquidator should be at liberty to carry the agreement into execution.

Solicitors for *Miller*: Messrs. *Bevan & Whitting.*
Solicitor for the Liquidator: Mr. *T. H. Devonshire.*
Solicitors for the Opposing Shareholders: Messrs. *Tucker & New.*

COLES *v.* MORRIS.

L. J. C. 1867 July 30.

Practice—Examination of Witnesses—Proceeding by Motion for Decree—15 & 16 *Vict. c.* 86, *ss.* 15, 40—*General Order of 5th of February*, 1861, *rule* 6.

Plaintiff, before joining issue, and before giving notice of motion for decree, subpœnaed witnesses to be examined before the Examiner, and the Examiner took the depositions of the witnesses *ex parte* (not allowing the Defendants to cross-examine), and filed them on the 11th of March, and the Plaintiff served notice of motion for decree on the 26th of April, with a list of affidavits which he intended to use, including these depositions; and the Defendants, not until the 11th of May, moved to have the depositions taken off the file, on which day they had also obtained extension of time to answer the evidence specified in the notice of motion:—

Held, that the filing of the depositions was irregular, but the Court, on the ground of the Defendants' delay, refused to take the depositions off the file; but gave the Defendants leave to cross-examine.

THIS was an appeal by the Defendants from an order of Vice-Chancellor *Malins*.

The bill was filed on the 19th of September, 1866, and the answer on the 5th of December following.

Before the cause was put in issue, or notice of motion for decree served, the Plaintiff obtained an appointment, and subpœnaed six witnesses to give evidence before the Examiner. On the 6th of March he gave the Defendants' solicitors notice that he had subpœnaed four of these witnesses to be examined on the 11th following; and, on the 8th, he gave similar notice as to the remaining two. Pursuant to these notices, counsel for the Defendants appeared before the Examiner on the 11th of March, and was asked whether he appeared as counsel, solicitor, or agent for the Plaintiff, and, replying in the negative, was told he had no right to be present, and he thereupon withdrew.

On the 26th of April, notice of motion for decree was given, and appended to the notice was the usual list of the affidavits which the Plaintiff intended to read, in which list were comprised the depositions of the six above-mentioned witnesses, who were therein stated to have been examined *ex parte* in the cause on the 11th of March.

The time to file affidavits in opposition to the notice of motion

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for decree expired on the 6th of May, and on that day Defendants' solicitors applied for a summons (which was issued on the 11th) for enlarging the time; the reason being, as their clerk deposed, that up to that day he had been unable to obtain printed copies of the evidence. He said that when he took out the summons he was altogether ignorant of the evidence.

On the 11th of May, the Defendants' solicitors gave the Plaintiff's solicitor notice of a motion, by special leave, before the Vice-Chancellor, that the depositions of these six witnesses might be taken off the file, on the ground that they had been filed irregularly; and His Honour, on the 13th of May, after argument, refused to make any order upon the motion, except that the Defendants be at liberty to cross-examine the witnesses before the Examiner, the Plaintiff to produce the witnesses to be so cross-examined upon receiving due and proper notice; and the Defendants to pay the Plaintiff his costs of the motion.

This was the order now appealed from.

Mr. *Baily*, Q.C., and Mr. *F. Waller*, for the Defendants:—

According to the amended practice, when issue has been joined in a cause (and not before), a process is prescribed (1) for examining a witness *ex parte*. By the 15th section of the 15 & 16 Vict. c. 86, a Plaintiff is empowered after answer, and before replication, to move for a decree upon notice; and the 40th section of the same Act gives either party "in a cause or matter depending" power by subpœna to summon a witness to be examined orally for the purpose of using his evidence upon "any claim, motion, petition, or other proceeding." That a motion for decree is a "motion" within this section was decided in *Williams* v. *Williams* (2).

Now whether, after notice of motion for decree, a Plaintiff may, by a like process, subpœna a witness before issue joined, or whether he must not first reply, it is not necessary now to inquire. But that before notice of motion for decree, and before issue joined, a Plaintiff cannot take this step, is clear. There is no regulation empowering him to do so; and the whole intention and scope of the

(1) G. O. 5th Feb. 1861, rule 6.

(2) 17 Beav. 156. 17 Jur. 434

Orders is opposed to such a course. In *Smith* v. *Baker* (1) Plaintiff examined a witness *ex parte*, and filed his depositions as an affidavit, and the Court refused to take the depositions off the file, but directed the Plaintiff to produce the witness, if required, for cross-examination, and gave the Defendant leave to cross-examine him. But in that case the witness had been subpœnaed after notice of motion for decree. In *Rendle* v. *Metropolitan and Provincial Bank* (2) Vice-Chancellor *Stuart* expressed an opinion that a Plaintiff is not at liberty to proceed to take depositions, either before or after answer, without filing a replication, or giving notice of motion for decree.

We contend that if a Plaintiff cannot obtain the evidence of a witness by affidavit, he must serve notice of motion for decree, or reply, before he can subpœna the witness; or, at least, if he can subpœna a witness before putting the cause in issue, he can examine the witness only in the presence of the Defendant, and subject to the Defendant's right of cross-examination. [Reference was also made to *Ford* v. *Tennant* (3) and *Wigan* v. *Rowland* (4).]

Mr. *Glasse*, Q.C., and Mr. *J. Napier Higgins*, for the Plaintiff:—

The Defendants are in no way practically injured by this proceeding. They have actually obtained further time to answer these very depositions along with the affidavits, notice of which was appended to the notice of motion.

It has been repeatedly held, as in *Smith* v. *Baker*, that depositions once on the files of the Court will not be removed; that leave will be given to cross-examine upon them. That is all that the Defendants can want, and that they have already got.

That evidence may in some instances be gone into before notice of motion for decree is plain from a decision in *Thomas* v. *Bernard* (5), where Vice-Chancellor *Kindersley* held that if the evidence be inconsistent with the case made by the bill, the motion for decree will be simply refused, leaving the cause to come to a hearing.

If the Defendants' contention be right, there is no means of

(1) 2 H. & M. 498.
(2) June 26, 1867. 2 W.R. 239.
(3) 11 W. R. 275.
(4) 10 Hare, App. xviii, 17 Jur. 816.
(5) 5 Jur. (N.S.) 31; 7 W. R. 86.

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summoning an unwilling witness in a proceeding by motion for decree.

Before the Examiners, we did not oppose cross-examination by the Defendants.

The LORD JUSTICE LORD CAIRNS said he thought the original filing of the depositions irregular, but he would call on the Appellants to shew why they were not, on the 11th of March, in a position to have taken the objection immediately.

Mr. *Baily*:—

The time between the 11th of March and the 11th of May may be divided into two periods—that which elapsed before service of notice of motion, and after. Until notice of motion was given on the 26th of April, we did not know whether these depositions were filed or not. The Examiner might have filed them, but until we had notice we did not know whether they were intended to be used or not. No special notice was given before the ordinary notice of motion came.

As to the period after the service, there is the testimony of our solicitors' clerk, that printed copies of these depositions were not to be had, and he did not know the nature of the evidence.

LORD CAIRNS, L.J.:—

I do not feel any doubt whatever that the examination originally taken before the Examiner was irregular. It cannot be supported under the Order of February, 1861, because that Order only applies to the hearing of a cause. If it is capable of being supported at all, it can only be under the 40th section of the 15 & 16 Vict. c. 86. Now I am clearly of opinion that that section, where it declares that any party may subpœna and examine a witness orally before an Examiner, for the purpose of using his evidence "upon any claim, motion, petition, or other proceeding before the Court," is confined to those cases where the evidence is to be used, not with a view to some claim afterwards to be filed, some motion afterwards to be made, or some petition afterwards to be presented, but with reference to a claim, motion, or petition, in a cause or matter actually pending, which raises some issue, or states some facts,

upon which the Court is called upon to adjudicate, to which the evidence must be relevant, and the relevancy to which of the evidence may be tested. Nothing can be more inconvenient, nothing more contrary to the whole course of the practice of the Court, than that upon the mere filing of a bill, before issue joined, without any application for specific relief by motion or by petition, either party to the cause should be able to summon witnesses at large, and examine them at large, without anything to guide the Examiner, or anything to establish the relevancy of the examination. For the argument must go to this—that in the case of a bill filed, without an answer being put in, without its being known whether the Defendant admits or denies the case, witnesses may be examined at large to prove what may afterwards turn out to be a matter not in dispute. It has been said that it would be very inconvenient that a Plaintiff, desiring to give notice of motion for decree, not being able to obtain affidavits, should not be at liberty to call witnesses for the purpose of proving his case. The answer is, that the proceeding by motion for decree is an entirely new practice, which gives to Plaintiffs a great advantage, as is shewn by the extent to which it has been resorted to; but, after all, it is a privilege the use of which must depend on the Plaintiff being able to procure evidence by affidavit. If he cannot do that, he has another course open to him, to proceed in the regular way, and bring the cause to a hearing. These observations are wholly independent of the question whether, after notice of motion for decree has been given, the Defendant, in opposing the motion, or the Plaintiff, for the purpose of replying to the Defendant, may or may not have a subpœna to examine witnesses. I do not give any opinion, and, on the other hand, I do not throw out any doubt, as to the power of a Defendant or a Plaintiff so to do after notice of motion for decree has been given. Therefore if, immediately after the 11th of March, an application had been made with regard to these depositions, I think the Court ought to have entertained the application, and removed the depositions from the file.

But then comes the further question, what has been the course taken by the Defendants? The Plaintiff's conduct appears to have been perfectly *bonâ fide* throughout. He evidently thought

(1) See Pellatt v. Nicholls, 14 Beav. 390.

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he was entitled to take the evidence which he proposed to take before the Examiner; he gave notice of his having summoned these witnesses to the Defendants; the Defendants, by their counsel, attended before the Examiner, as did the Plaintiff, by his counsel; and both counsel seem to have been perfectly willing that the witnesses should be examined and cross-examined then and there. The Examiner entertained the view, on the one hand, that the examination might go on; but, on the other hand, that it should be *ex parte;* and accordingly no cross-examination took place. Upon that the Defendants ought to have made an application to the Court. They had another opportunity of doing so when the notice of motion for decree was given; because they then had notice not only that these depositions had been taken, but that they would be used. Instead of doing that, on the 11th of May they obtained an order for extending the time to answer the Plaintiff's evidence, of which they had had notice by the notice of motion that these depositions formed a part. On the same 11th of May they gave notice of motion before the Vice-Chancellor to have these depositions removed from the file, and upon that occasion the order now under appeal was made. The Vice-Chancellor refused to take the depositions off the file, and gave leave to the Defendants to cross-examine.

I think that order fully satisfied the justice of this case. Although I am unable to take the same view as the Vice-Chancellor seems to have taken of the right of the Plaintiff originally to have this evidence filed, I think His Honour gave the Defendants everything they were entitled to; and, having regard to the delay that has taken place in complaining of this, which at the most was an irregularity, I cannot differ from the Vice-Chancellor, even if I thought it matter of appeal, on the question of the way in which he has disposed of the costs. I think, therefore, this appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *Alfred Jones.*
Solicitors for the Defendants: Messrs. *Evans, & Co.*

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L. J. R.
1867
July 30.

Taxation after Payment—Special Circumstances—6 & 7 Vict. c. 73, s. 38—Taxation by Party not Chargeable—Costs.

W., on the 31st of May, 1865, agreed in writing to take a lease from *G. & T.*, and to pay their costs of the agreement and of the lease and counterpart, and incidental thereto. *W.* paid the bill of *G. & T.'s* solicitors, and afterwards applied for taxation against the solicitors. An order was made to tax the bill "upon the terms of the agreement dated the 31st of May, 1865:"—

Held, on appeal, that this reference to the agreement was erroneous, for that the order must be to tax the bill which *W.* had paid, without anything to limit the bill to that which would be the proper bill as between *G. & T.* and *W.*

The circumstances which will induce the Court to order taxation after payment considered.

Costs of motion to tax and of appeal motion ordered to abide the result of the taxation.

THIS was a motion by Messrs. *Newman*, solicitors, by way of appeal from an order of the Master of the Rolls, directing taxation of their bill of costs.

On the 31st of May, 1865, Colonel *West* agreed in writing to take a lease from Messrs. *Gray & Tabart* of a piece of ground in the rear of the *Surrey Theatre*. It was provided by the agreement that *Gray & Tabart's* costs of the agreement, and of the lease and counterpart, and incidental thereto, should be paid by Colonel *West*.

On the 14th of November, 1865, Messrs. *Newman*, who were the solicitors of *Gray & Tabart*, sent the draft lease through their agents, Messrs. *Brooksbank & Galland*, to Messrs. *Poole & Gamlen*, Colonel *West's* solicitors. On the 12th of March, 1866, Mr. *Gamlen* applied for an abstract of the title, which was accordingly sent. In May, Colonel *West* changed his solicitors. On the 21st November, 1866, Messrs. *Head & Pattison*, the new solicitors, applied to examine the deeds with the abstract, and on the 11th of December, 1866, they returned the draft lease approved.

On the 31st of December, 1866, Mr. *Galland* sent the engrossment of the lease and counterpart to Messrs. *Head & Pattison* for examination, and for execution of the counterpart by Colonel *West*, with a letter, concluding, "We will make out and send you our charges."

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On the 2nd of January, 1867, Messrs. *Head & Pattison* wrote to Messrs. *Brooksbank & Galland*, proposing to complete on the 4th, at twelve o'clock.

On the 3rd, Messrs. *Brooksbank & Galland* replied, "Messrs. *Newman* write to say that the covenants must be released by deed. We do not wish, however, to keep back the lease, and will take your undertaking to obtain a release from Colonel *West*. Subject to this, we shall be ready to exchange to-morrow, at twelve. We presume you will settle the costs on taking up the lease."

Mr. *Head's* deposition as to what took place next day, was as follows:—

"On the 4th of January, 1867, I attended at the offices of the said *R. Galland*, pursuant to appointment, and there saw the said *R. Galland*. I told him that he had not sent an account of his costs, as promised; and he said he had not had time, but that he had made out his bill, and it amounted to £50 11*s.* 4*d.* I said that appeared a large sum, and asked him if he had a copy of the bill for me. He said he had not, but that I might peruse the draft bill. I asked him if I might take away the draft bill. He said, 'No.' I then proposed to pay the sum named, without prejudice to my client's right to tax. The said *R. Galland* declined to accede to this, but offered to postpone the appointment in order to afford time to investigate the bill. I had previously informed the said *R. Galland*, and he well knew, that it was of the utmost importance to my client to have the business settled that day, as a heavy mortgage transaction was to be completed on the following morning, and it was necessary that the lease should be completed first. I then asked the said *R. Galland* if he would accept my cheque as a tender, which he declined to do. I left his chambers. I returned in about an hour, and made him a tender of £50 11*s.* 4*d.* which he accepted, and gave me a receipt in the words and figures following:—

"'Received of Messrs. *Head & Pattison*, £50 11*s.* 4*d.*, the bill of costs of the lessors, under the agreement of the 31st of May, 1865.

"'*Brooksbank & Galland.*'"

Mr. *Galland*, on the other hand, after deposing as to the delay which had taken place as above, notwithstanding repeated applica-

tions by him to urge on the matter, and setting forth the letters which had passed down to the 4th of January, stated as follows:—

"After receiving Messrs. *Newman & Son's* charges, I had a draft bill of costs prepared, but was unable to settle it until the morning of the 4th of January. The bill is intituled, 'The bill of costs of the lessors, under the agreement of the 31st of May, 1865.' This draft I shewed to Mr. *Head* when he called to settle, and explained that there had not been time to copy it. He, however, refused to look at the draft. I then offered to have it copied and sent to him that day, and complete the matter the following day, and reminded him that I was acting merely as Messrs. *Newman & Son's* agent. He refused, however, to do this, but offered to pay under protest, which I declined. Mr. *Head* left the office, and returned in about half an hour. He brought the money, £50 11*s.* 4*d.*, the amount of the costs, and tendered it unconditionally, which I accepted."

On the 12th of February, Colonel *West* took out a summons "to shew cause why the bill of costs of the said *C. Newman & T. J. Newman*, against the lessors of the said *T. J. West*, and payable and paid by the said *T. J. West*, should not be referred to the proper Taxing Master of this Court to tax and settle the said bill, with all usual and necessary directions consequent thereon."

The summons was adjourned into Court, and on the 14th of March the Master of the Rolls made an order, "That it be referred to the Taxing Master to tax and settle, upon the terms of the agreement dated the 31st of May, 1865, the bill of fees and disbursements delivered by the said *C. Newman & T. J. Newman* to the said applicant, and which were paid by the said applicant on the 4th of January, 1867."

The Messrs. *Newman* were ordered to pay the costs of the application, the costs of taxation following the statutory rule (1). (3 W.R. 105)

(1) Mar. 14. LORD ROMILLY, M.R.:—

I am of opinion that Colonel *West* is entitled to an order for taxation.

In the first place, I think it desirable to observe that some mistake seems to exist as to what constitutes pressure. In *Re Pugh* (32 Beav. 173) I laid down this as a principle: that wherever the mortgagee, or the vendor, refuses to complete except upon payment of the costs, and the bill of costs is delivered at the same time, so that there is no opportunity of examining it, that amounts to pressure. My decision was appealed from, and the Lords Justices affirmed my view of the case. Lord *Langdale* unquestionably, in *Re Harrison* (10 Beav. 57), laid down this

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The *Solicitor-General* (Mr. *Selwyn*), and Mr. *C. T. Simpson*, for the Appellants, referred to *Re Fyson* (1); *Re Massey* (2); *Re*

rule: that there must be both pressure, and items, I cannot say amounting to fraud, but of a character which must be taxed off in order to entitle the bill to be taxed. That case of *Re Harrison* was considered in the case of *Re Deardon* (17 Jur. 993), and Chief Baron *Pollock*, and Barons *Parke*, *Platt*, and *Martin*, all concurred in disapproving of it. I have always been of opinion that where a bill is delivered at the time of the transaction, or only a few hours before, and the solicitor says, "I will not complete the transaction unless you pay me the money," that that amounts to pressure; because postponing the transaction may be a very serious thing.

Mr. *Selwyn* argued with much ingenuity, and some force, that Colonel *West* had himself created the pressure. But there is this to be said, that he probably was some time in finding a mortgagee to advance him the money; such a person cannot be found at a moment's notice, and when he is found it is often important that the matter should be completed immediately.

Another proposition laid down in many of the cases is this (and I think it has been laid down by the Court of Appeal), that where it is pointed out that the delay of a day, or the like, would not afford an opportunity for taxation, it is of no use to offer to delay it for that time. Mr. *Selwyn* says the solicitor here offered to delay the matter until the next day. But supposing he had, the result would have been this: "I think your bill is quite wrong, and must be taxed." "Very well, tax it; but I will not allow the lease to be executed until after the taxation." In the meantime it would be delayed for a very considerable time, and considering the influence of a solicitor over his client, nobody knows what impediments might thus be created. I am of opinion, therefore—and I laid that down very distinctly in *Re Pugh* (32 Beav. 173)—that where a bill of costs is delivered at the time of the completion of the transaction, that circumstance of itself evidences pressure, and entitles you to taxation, provided there are any items in the bill that are wrong. I do not find that in *Ex parte Barton* (4 D. M. & G. 108) there were any items which were shewn to be wrong in the bill. In this bill I am of opinion that there are. In these cases I have frequently asked for the assistance of one of the Taxing Masters to advise me upon the subject, and wherever I have done so, I have stated to the parties that I either have done so, or intend to do so. In this case I do not think it necessary, because I am not going into the question of amounts, although there are some amounts here which I think questionable; but the agreement is to pay the costs of the lessors, of the agreement, and of the lease and counterpart, and incidental thereto. Now I am clear that this bill goes beyond that.

It is said, with great truth, that in all these cases the persons who agree to pay the bill, or who are bound by law to pay the bill, must put themselves in the situation of the client of the solicitor when the bill is paid. That is true; but it is only so far as the subject matter is concerned. If that were not

(1) 9 Beav. 117.

(2) 34 Beav. 463, 11 Jur. 25594

Harrison (1); *Re Forsyth* (2); *Wakefield* v. *Newbon* (3); *Ex parte Barton* (4); and contended that there was no pressure; that the bill ought not to be taxed at all; and that, if taxed, it ought to be taxed as if *Gray & Tabart* had obtained the order, and not with a reference to the agreement.

Mr. *Jessel*, Q.C., and Mr. *Ince*, for Colonel *West*, referred to *Ex parte Wilkinson* (5); *Re Browne* (6); *Re Strother* (7); *Re Foster* (8); *Re Elmslie* (9); *Re Wells* (10); *Re Pugh* (11); *Re Lett* (12).

Mr. *C. T. Simpson*, in reply.

SIR JOHN ROLT, L.J.:—

I entirely agree with the Master of the Rolls on the main point determined in this case; viz., that Colonel *West* is entitled to have Messrs. *Newman's* bill of costs taxed. But before I give my reasons for that, I will examine another point on which I somewhat differ from the conclusion at which he has arrived. The order for taxation refers to the terms of the agreement between *Gray & Tabart* and Colonel *West*, as to the costs which Colonel *West* was to pay; and makes those terms the rule for the Taxing Master to act upon. Now the 6 & 7 Vict. c. 73, s. 38, appears to me to express very clearly, that if a person who is not chargeable thinks fit to pay the bill it is open to him to do so, and if he does so, he shall be entitled to have that bill taxed, as the party chargeable therewith might himself have done. Here Colonel *West* thought fit to pay this bill. It is said by the counsel for Colonel *West* that Messrs. *Newman* could

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so, Colonel *West* might have to pay the bill of costs for conducting a purchase or a sale a year before in another transaction. The bill delivered to him ought to include only the particular costs which the solicitors were entitled to charge against their clients for the particular matter in question; which are defined by the agreement which the applicant entered into. I shall therefore make an order to tax upon the terms of the agreement.

(1) 10 Beav. 57.
(2) 34 Ibid. 140; 2 D. J. & S. 509.
(3) 6 Q. B. 276.
(4) 4 D. M. & G. 108.
(5) 2 Coll. 92.
(6) 1 D. M. & G. 322.
(7) 3 K. & J. 518, 527.
(8) 2 D. F. & J. 105, 117.
(9) 12 Beav. 538, 544.
(10) 8 Ibid. 416.
(11) 32 Ibid. 173; 1 D., J. & S. 673.
(12) 31 Ibid. 488.

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have no lien upon the lease and counterpart other than that which *Gray & Tabart* could have had, and that, therefore, you have only to ascertain what lien Messrs. *Gray & Tabart* had upon the lease and counterpart as against Colonel *West*. It appears to me that the answer to that argument is complete; not only was there no lien upon these deeds in Messrs. *Gray & Tabart* as against Colonel *West*, except according to the terms of the agreement, but there was no privity whatever between Colonel *West* and Messrs. *Newman*. Colonel *West* thought it right, for purposes of his own, to pay the bill of costs due from Messrs. *Gray & Tabart* to Messrs. *Newman*, and then the Act says, that under those circumstances, he is to have the right of taxation which the person who was chargeable would have had. What then is the bill to be taxed? I am of opinion that the bill which he paid is the bill that is to be taxed. The construction of the 38th section would not, I think, justify the Court in limiting the bill which Colonel *West* is to have taxed to that which would be the proper bill as between *Gray & Tabart* and himself, but that it is the bill which he paid that is the subject of taxation. The form of the summons was referred to in support of the Respondent's argument on this point, but I do not think that it can be successfully relied on.

I come, then, to the reasons which induce me to think that the Master of the Rolls was right in directing taxation. The statute does not point out the special circumstances which shall in any case authorize the Court to direct taxation after payment; it is left to the Court to determine what special circumstances are sufficient for the purpose. I do not think that any of the decisions have laid down, and it is scarcely possible to lay down, a general rule on the subject. My view is this, that if a bill is produced at the last moment, and reasonable facility for taxation is refused after an opportunity for taxation has been asked for, and looking at the bill there appears to be a substantial ground for taxation, then taxation after payment ought to be allowed. In this case it is contended by the Appellants that, even taking that to be the rule, it does not apply in the present case, because the pressure upon Colonel *West* was caused by his own previous delay. I think there is no foundation for this argument. There was a great deal

of courtesy shewn before the 31st of December by Messrs. *Newman* and their *London* agents to Colonel *West*, and during that time the delay was, no doubt, the delay of Colonel *West* alone, but the question turns upon what took place after the 31st of December. You cannot, if I may use the expression, set off the courtesies shewn and facilities given before the close of the transaction against the conduct at the close of the transaction. On the day of completion, up to which time the bill had not been delivered, a request was made—a reasonable request, as it appears to me—that an opportunity of taxing should be given. I think that communications in these cases between solicitors of respectability, as these are, should be of such a character as the earlier communications between these parties evidently were; and that as soon as a solicitor is told by the opposite solicitor, "I should like your bill to be taxed," he should give every facility for the purpose. When the completion of the business within a short time is necessary, and the party who is liable to pay is willing to pay at once the whole amount, provided the right to taxation be reserved, and this offer is refused, I think these are special circumstances which justify taxation, if, when the bill of costs is looked at, it appears substantially to require taxation, which seems to me to be the case with this bill; in saying which, of course, I omit altogether from consideration those items which Mr. *Jessel* and Mr. *Ince* in their argument objected to as not being within the agreement. If I thought there was any doubt I would speak to one of the Taxing Masters, who, I have no doubt, would favour me with an opinion on the subject. In saying that the bill appears to require taxation, I am not at all meaning to say that the bill contains charges which a respectable solicitor might not honestly make.

There remains then only the question, whether the costs, up to and including the hearing of the summons, ought to be paid by the Appellants? I think that when an objection, not absolutely frivolous, is taken to the right to tax, the costs of the hearing ought to abide the result of the taxation, and in this respect I think the order of the Master of the Rolls must be varied.

The course I propose to take with reference to the costs of the appeal may, perhaps, be novel, but I hope it is not irregular. I think that I have a discretion on the subject, and that the most

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reasonable course will be to let the costs of the appeal also abide the result of the taxation.

Solicitors for Appellants: Messrs. *Brooksbank & Galland.*
Solicitors for Respondent: Messrs. *Pattison & Head.*

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In re FINANCIAL CORPORATION.

FEILING'S AND RIMINGTON'S CASE. KING'S CASE. HOLMES'S, PRITCHARD'S, AND ADAMS'S CASES.

Companies Act, 1862, *ss.* 8, 12—*Subdivision of Shares into Shares of less nominal Amount—Contributory.*

3 Ch. 135.
5 Eq 114
5 Ch 354
9 Ch 57.
16 Eq 363.
2 L.D. 831.

The memorandum of association of a company provided that the capital should be £3,000,000, divided into 30,000 shares of £100 each, "subject to be increased or modified," and the articles gave the board of directors power to divide the shares into shares of smaller amount. The directors exercised this power and converted each £100 share into five £20 shares:—

Held, that such conversion was unauthorized and void; for that, under clause 12 of the *Companies Act*, the memorandum can only be altered in certain particulars, of which this was not one, and, *per* Lord *Cairns*, L.J., an express power in the memorandum to reduce the nominal amounts of the shares would be ineffectual.

After the attempted conversion, *F.* transferred to *R.* fifty of the new £20 shares. These shares could be identified in the books of the company as being the shares into which ten of the original £100 shares had been divided:—

Held, that the transfer was effectual to pass the ten £100 shares, and that *R.*, and not *F.*, must be on the list of contributories.

K. at the time of the attempted conversion was a holder of £100 shares, the certificates of which he never exchanged. The directors, after the conversion, made a call on the £20 shares, and *K.* not paying it, they forfeited his shares in January, 1865, in a way which, if the conversion had been legal, would have been quite regular. *K.* wrote a letter asking a remission of the forfeiture, treating the shares as £20 shares, and making no objection to the regularity of the proceedings. No notice was taken of the letter, and he never afterwards claimed to be a member. In May, 1866, a winding-up order was made:—

Held, that the forfeiture must be treated as valid, and that *K.* was not a contributory.

THE questions raised in these appeal motions all turned upon the effect of an attempted conversion of the £100 shares of the *Financial Corporation, Limited*, into £20 shares.

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The company was a company limited by shares, and was formed under the Act of 1862. It was registered on the 29th of December, 1863, and the 5th article of the memorandum of association was as follows: "The nominal capital of the company is £3,000,000 sterling, divided into 30,000 shares of £100 each, subject to be increased or modified." The articles of association contained the following provisions:

"7. The nominal capital of the company shall consist of £3,000,000 sterling, divided into 30,000 shares of £100 each, to be paid at the times and in the manner hereinafter provided. But the board may, from time to time, by a resolution passed by a majority consisting of not less than two-thirds of the whole number of directors, reduce the nominal value of the shares, or any of them, by dividing the same into a larger number of shares of any nominal value authorized by law, or consolidate the shares into shares of a larger nominal value, so that the shares when reduced or consolidated shall together be equivalent in nominal value to the nominal value of the original shares before the reduction."

"9. The board may, from time to time, by a resolution passed by a majority consisting of not less than two-thirds of the whole number of directors, reduce the nominal amount of the capital for the time being, or increase the existing capital to any amount over and above the said sum of £3,000,000, by the creation of any number of new shares, of such nominal value, upon such terms, and either with or without preference or priority, as regards dividends, or otherwise, over the shares in the then existing capital, as such majority of the directors may deem expedient."

"11. Whenever it is duly resolved to reduce or increase the capital, the board shall carry the resolution into effect in such manner as they deem most expedient, subject, nevertheless, to the provisions of the statutes and these presents, and to any special directions (if any) given in reference thereto by the extraordinary meeting at which the resolution of the board may have been ratified and confirmed as aforesaid."

"18. No share shall be sub-divided.

"19. The company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or

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(except only as is by these presents otherwise expressly provided) any other right in respect of a share than an absolute right thereto in accordance with these presents, in the person from time to time registered as the holder thereof."

"27. Every transfer of a share shall be in such form as the board from time to time lawfully approve, and before registration of any transfer the instrument of transfer shall be deposited with the company, accompanied by such evidence as the board may require to prove the title of the transferor, and such instrument of transfer shall thenceforward be kept by the company."

The articles contained the following provisions as to the forfeiture of shares:—

"37. If any shareholder shall fail to pay any call due from him on the appointed day, the board may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him requiring him to pay the call, together with interest, and any expenses that may have accrued by reason of such non-payment.

"38. The notice shall name a further day, not being less than twenty-one days from the day of giving the notice, on or before which such call and all interest and expenses that have accrued by reason of such non-payment are to be paid. It shall also name the place or places where payment is to be made, the place so named being either the registered office of the company, or some other place at which the calls of the company are usually made payable. The notice shall also state that in the event of non-payment of such call, interest, and expenses, at or before the time, and at the place appointed, the share or shares in respect of which the call was made will be liable to be forfeited.

"39. If the requisitions of any such notice as aforesaid are not complied with, every or any share in respect of such notice has been given may, at any time thereafter, before payment of all calls, interest, and expenses, due in respect thereof has been made, be forfeited by a resolution to the board to that effect.

"40. When any share is so declared to be forfeited, notice of the forfeiture shall be given to the holder of the share, and an entry of the forfeiture, with the date thereof, shall forthwith be made in the register.

"43. The forfeiture of a share shall involve the extinction at the

time of the forfeiture of all interest in, all claims and demands against, the company in respect of the share, and all other rights incident to the share, except only such of those rights as by these presents are expressly saved."

Soon after the formation of the company, 15,000 of the £100 shares were allotted and issued, but no further shares in the capital of the company beyond £1,500,000, the amount of the 15,000 £100 shares, were ever issued. On the 20th of May, 1864, a call was made of £2 per share on each of the £100 shares. On the 1st of July, 1864, at a meeting of the directors, at which more than two-thirds of them were present, a resolution was passed that the time had arrived when the nominal amount of the shares of the company should be reduced from £100 each to £20 each for the greater convenience of the proprietors thereof, and that the said shares should therefore be reduced as soon as the necessary preliminary arrangements were completed, and it was referred to the finance committee to make the necessary arrangements for carrying the resolution into effect. On the 13th of July, 1864, the directors announced to the shareholders the intended reduction of the shares in a circular letter, which, so far as is material, was in these terms: "It has been urged upon the directors that it would be very desirable to reduce the nominal amount of the shares, so that the advantageous investment afforded to the shareholders of the corporation may be secured without the accompanying risk of so large an uncalled portion of capital. In view of this desire, and in accordance with the power contained in the articles of association for this purpose, the directors have reduced the nominal value of the shares from £100 (£5 paid) to £20 (£1 paid), so that five of the new shares will be exchanged for each one of the present shares, and the liability to calls will be reduced in the like proportion per share. Notice will be given when the new certificates are ready to be exchanged." On the same 13th of July, 1864, an interim dividend of 3*s.* per share was declared.

The preliminary arrangements for carrying the foregoing resolution into effect appeared to have been completed on or before the 15th of August, 1864, for in the register of transfers there was a memorandum under that date in the following terms: "The shares of this corporation having been changed by order of the board of

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directors from 15,000 shares of £100 each (£5 paid) to 75,000 shares of £20 each (£1 paid), all entries in this register from this date will come under this denomination." From that date, accordingly, all the entries in the register were of £20 shares. On the 22nd of September, 1864, notice was issued to the shareholders that the certificates for the new shares were ready, and would be given in exchange for the shares they then held, and on the 23rd of September, 1864, a call of 10s. per share was made upon each of the new £20 shares.

No list of members of the company was ever received by the Registrar of Joint Stock Companies, inasmuch as the first and only list forwarded to him was after the above steps for the conversion of the shares had been taken, and the list accordingly treated the shares in the company as £20 shares, on which ground the registrar refused to receive it.

An order for winding up the company was made on the 28th of May, 1866, up to which time the company and its members had continued to treat the conversion as legal, and to deal with the shares as being £20 shares, and thus arose the questions calling for decision on the present appeal motions.

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By a deed of transfer, bearing date the 23rd of May, 1864, before the attempted conversion, *William Francis Lawrence* transferred to *Feiling* ten £100 shares in the company, No. 12,269 to 12,278, subject to the conditions on which *Lawrence* then held the same. *Feiling* accepted the shares subject to those conditions, and on the 26th of May, 1864, *Feiling* was entered on the register of members of the company as the holder of these ten £100 shares. *Feiling* paid the above-mentioned call of £2, and received the above-mentioned interim dividend upon these ten shares. In September, 1864, he carried in the certificates of these ten £100 shares, and received in lieu of them new certificates for fifty £20 shares, numbered 19,531 to 19,580, and he was entered on the register of members of the company as the holder of these fifty shares, upon which he, on the 21st of October, 1864, paid the above-mentioned

call of 10*s.* per share. By a deed of transfer, dated the 14th of November, 1864, he purported to transfer to *Rimington* fifty shares, numbered 19,531 to 19,580, in the *Financial Corporation, Limited* (not mentioning the nominal amount of the shares), to hold to *Rimington* subject to the conditions on which *Feiling* held the same.

Under this deed of transfer *Rimington* was, on the 17th of November, 1864, entered on the register of members of the company as the holder of these fifty £20 shares; and he paid upon them a second call of 10*s.* per share, which was made on the 27th of January, 1865. He was at the date of this transfer the holder of a large number of other shares in the company, some of which were £20 shares, which had been exchanged for £100 shares held by him, and he was therefore fully aware of the circumstances attending the conversion. *Feiling* had not at the date of the transfer any shares in the company, except the fifty £20 shares, numbered 19,531 to 19,580, which were clearly identified in the share register as being the shares which he received in exchange for his ten £100 shares, numbered 12,269 to 12,278. *Rimington* was on the register as holder of the last-mentioned fifty £20 shares at the time of the winding-up order.

The Master of the Rolls having decided that *Rimington* was a contributory, he now appealed from that decision.

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King was, at the time of the conversion of shares, the holder of twenty £100 shares. He was aware of the conversion, but he did not, so far as appeared, exchange his certificates. On the 23rd of September, 1864, a resolution for a call of 10*s.* on each of the £20 shares was passed, and notice of the call was given to *King* by a letter of the 23rd of September, 1864. On the 2nd of December, 1864, a notice in accordance with clauses 37 and 38 of the articles was sent to him requiring payment of the call by a certain day, and threatening forfeiture in the event of non-payment. The call not having been paid, the directors, on the 6th of January, 1865, declared *King's* shares forfeited, notice of which was given to him

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and an entry of it made in the register. His shares were throughout these proceedings described as £20 shares. On the 12th of January, 1865, he wrote to the secretary the following letter:—

"Dear Sir,—I called yesterday at the office just to say it was not my wish that the shares should be forfeited, and that it was quite by accident that I had not paid the call, the fact being that, through the change in value, I thought there was some mistake in the number of new ones allotted to me, and I have been going to to call for some time upon you.

"The gentleman in the office explained that he thought my letter had been sent me by mistake; but whether or not, be so kind as to obtain the revocation of the forfeiture and I will pay the call. Mr. *Walford*, a long time since, when the shares were much better, advised me to hold them, and I have done so, and I intend to do. I know your director, Mr. *Goodson*, as a shareholder in the *Provincial Banking Corporation*, and I think he will say a good word for me if necessary.

"Yours faithfully,

"*J. T. King.*"

Nothing, so far as appeared, was ever done in consequence of this letter, and *King* was never in any way recognised as a member of the company after the declaration of forfeiture.

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Holmes held five £100 shares in the company, which were converted into twenty-five £20 shares. After the conversion he bought twenty-five more of the £20 shares, which were transferred to him, and he was registered as the holder of them. It was not clearly established that the latter twenty-five shares could be identified with any five original £100 shares in the company. He paid calls and received dividends in respect of all the above shares.

Neither *Pritchard* nor *Adams* held any shares in the company before the conversion, but after the conversion *Pritchard* became the owner, by assignment, of 100, and *Adams* of 1,160 of the £20 shares. *Pritchard* paid calls and received dividends on the shares

so acquired by him. *Adams* never paid a call nor received a dividend. Both denied all knowledge of the circumstances attending the conversion, and of the company ever having had any other shares than £20 shares.

The cases of *Holmes*, *Pritchard*, and *Adams*, came first before the Court of Appeal, on motion to discharge an order of the Master of the Rolls, fixing them on the list of contributories in respect of the shares purchased by them; his Lordship being of opinion that they were estopped by their acts from disputing the validity of the conversion (1).

(1) Dec. 18, 1866. LORD ROMILLY, M.R.:—The view that I take of this case is that which I have stated on many former occasions, namely, that the Court has to consider the interests of three classes of persons; that is to say, the transferor, the transferee, and the large body of persons who may be affected, either beneficially or injuriously, by that transfer.

I hold this to be quite clear, that, assuming these gentlemen, Mr. *Holmes*, Mr. *Adams*, and Mr. *Pritchard*, knew perfectly well what the state of the company was (and they are bound to know what the Act of Parliament is); assuming also that they knew that these were originally £100 shares, and that they had been converted into £20 shares; it does not lie in their mouths to say that this is not, whether illegal or legal, a conversion by which they are bound; and I hold that, as between themselves and all persons who may be interested in that respect, they are bound by that conversion.

Now, none of these gentlemen profess, in the slightest degree, ignorance of what the state of the company was, and what the company had done; that the shares were originally £100 shares, and that they had been converted into £20 shares. I am of opinion that, being aware of that fact, they cannot, as against the transferor, or indeed as against anybody who is interested in holding them to that transfer, say that that was not a *bonâ fide* transfer so far as to make them liable to contribute in due proportion towards the money that may be required for winding up the company; and, if so, then the only question is this, whether the creditors and the other shareholders, who may consist of two classes, are bound by the transaction. I am of opinion that all the shareholders are bound by it who were aware that this conversion of £100 shares into five £20 shares had taken place, and sanctioned it, either directly or indirectly, by adopting the transaction itself. I do not think the creditors are bound by it. It very possibly may be open to the creditors to say that the transferor is the proper contributory, and not the transferee, but I have not the creditors here before me. I understand that there is no creditors' representative, and that the creditors are not represented on the present occasion, and therefore, though I am of opinion that, as the matter now stands as between the transferor and the transferee and the company, all these three gentlemen are contributories, and are bound to be upon the list of contributories, I do not mean by so saying that this binds the creditors, and that the creditors may not be entitled to say, if it should be their interest to

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Feb. 12, 13, 14. Sir *Roundell Palmer*, Q.C., Mr. *Selwyn*, Q.C., Mr. *Roxburgh*, Q.C., and Mr. *Eddis*, for *Holmes*, *Pritchard*, and *Adams*:—

We contend that *Holmes* ought not to be on the list as to the shares he bought after the conversion; and that *Pritchard* and *Adams* ought not to be on it at all. By the *Companies Act*, 1862, s. 8, the memorandum must state the amount of capital and the shares of fixed amount into which it is divided. This cannot be departed from, except as authorized by sect. 12: *Hutton* v. *Scarborough Cliff Hotel Company* (1); which section allows an alteration into shares of larger amount, but not of smaller. The attempted conversion of £100 shares into £20 shares was void, and no such things as £20 shares in this company ever existed. Where a proceeding is *intrà vires* mere irregularities will not vitiate it: *Bargate* v. *Shortridge* (2); but here the proceeding was wholly *ultrà vires* and void. These parties cannot be contributories as holders of £20 shares when there are no such shares. Sects. 38 and 74 of the Act shew who are contributories. We do not come within them; for we neither took, nor agreed to take, any £100 shares, and there never were, in the contemplation of the law, any others. It is a question whether if persons become holders of shares not authorized by the Act they can have the benefit of the principle of limited liability. It is attempted, therefore, to place the Appellants, who bargained for £20 shares having a legal existence, in a position in which they never contracted to be, and they cannot be charged: *Bunn's Case* (3). The true view, we submit, is, that the

say so, that the transferor ought to be placed on the list of contributories instead of the transferee. The effect of that would be that it would leave the rights of the transferor and the transferee to be settled as between themselves in another transaction; but the creditor might be entitled to say, "This was a transaction which was illegal, which did not bind me, and I am entitled to have that person upon the list of contributories whom it is most beneficial to me to have there placed." However, in holding, upon the present occasion, that these gentlemen are contributories, I mean to do it without prejudice to any steps which the creditors may take in the matter if they should be so advised, provided always of course that any steps are taken by the creditors within a reasonably short time.

Therefore I am of opinion, on the present occasion, these three gentlemen must remain on the list of contributories for the amount of shares which they have taken. The costs of all parties will be paid out of the estate.

(1) 2 Dr. & Sm. 514. 11 Jur. (N.S.) 649
(2) 5 H. L. C. 297.
(3) 2 D. F. & J. 275. 6 Jur. (N.S.) 1223

persons who were holders of £100 shares at the date of the conversion remain shareholders, and that all dealings with the £20 shares conferred only equitable interests. It is as if a shareholder in a company sold a share in fractions—the transferees would not be shareholders or contributories, though they might be *cestuis que trust* of aliquot parts of the share. There cannot be any estoppel. A party cannot estop himself from denying that a thing was done, unless the thing was one which could by possibility be done.

[*Bennett's Case* (1); *Ship's Case* (2); *Webster's Case* (3); *Stewart's Case* (4); *Brotherhood's Case* (5); and *Spackman's Case* (6), were also referred to.]

Mr. *Baggallay*, Q.C., Mr. *Cotton*, Q.C., and Mr. *C. T. Simpson*, for the official liquidator:—

The question whether there was power to convert depends on sect. 12 of the Act, having regard to clause 5 of the memorandum and clause 7 of the articles. The Act prohibits alteration of the memorandum, except in certain particulars, but it contains nothing to limit the terms of the memorandum, and if the memorandum provides for a reduction in the nominal value of the shares, such a reduction is not a variation of the memorandum, and therefore is not forbidden by sect. 12 of the act. An error of registration will not help a shareholder: *Bird's Case* (7). But supposing the conversion unauthorized, the Appellants are estopped by their conduct from disputing their liability. They agreed to hold an aliquot part of the capital of the company, and are liable accordingly. *Hull Cotton Company* v. *Wellesley* (8); *Ex parte Worth* (9); *Hitchcock's Case* (10); *Barclay's Case* (11); decide the present case against the Appellants. By sect. 23 of the Act everybody who has agreed to become a member of the company, and whose name is on the register, *i.e.* the register kept by the company, is a contributory, and the invalidity of the shares does not remove their liability: *Richmond's Case* (12). The definition of a contributory

(1) 5 D. M. & G. 284.
(2) 2 D. J. & S. 544.
(3) Law Rep. 2 Eq. 741.
(4) Ibid. 1 Ch. 574.
(5) 31 Beav 365; 31 L. J. (Ch.) 861.
(6) 12 W. R. 1133; 13 W. R. 479.
(7) 1 Sim. (N.S.) 47.
(8) 30 L. J. (Ex.) 5.
(9) 4 Drew. 529.
(10) 3 De G. & Sm. 92.
(11) 26 Beav. 177.
(12) 4 K. & J. 305, 319, 320.

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in the *Winding-up Act* of 1848 is to be regarded, for that in the Act of 1862 is substantially the same, and under the former Act these parties would be contributories: *Reaveley's Case* (1). If the conversion was illegal the company ceased to be a limited company, and was illegal; but that is no objection to the winding-up order, and no defence to persons who agreed to take shares: *Longworth's Executors' Case* (2).

Mr. *Kay*, Q.C., and Mr. *Tahourdin*, for the creditors' representative:—

Both the £100 shareholders and the £20 shareholders ought to be on the list. The case is, we submit, the same as if there had been an unauthorized issue of new £20 shares. The new shareholders cannot represent any part of the old capital, and therefore must represent new, for they are estopped from saying they are not shareholders by their acts: *Barclay's Case* (3); *Chapman and Barker's Case* (4); and by their delay: *Lawrence's Case* (5). There cannot now be any right to repudiate the £20 shares: *Ex parte Briggs* (6); *Henderson* v. *Royal British Bank* (7).

Sir *Roundell Palmer*, in reply:—

There is no estoppel, for estoppel only takes place when the act without it would be wholly inoperative; here it was operative to pass equitable interests in fractions of shares: *Bugg's Case* (8). There cannot be a double liability, only one person can be recognised as shareholder, and to introduce the old definition of a contributory into this Act would interfere with a cardinal principle of the Act, which differs from the old ones in giving a *locus standi* to creditors. The Act recognises no one but a member as a contributory. The doctrine of holding out does not apply, for any one who went to the company's office to inspect the list of shareholders would get notice of the articles and memorandum, and learn that there were no £20 shares. The cases referred to against us are inapplicable, for they do not relate to anything which was

(1) 1 De G. & Sm. 550.
(2) 1 D. F. & J. 17.
(3) 26 Beav. 177.
(4) Law Rep. 3 Eq. 361.
(5) Law Rep. 2 Ch. 412.
(6) Ibid. 1 Eq. 483.
(7) 7 E. & B. 356.
(8) 2 Dr. & Sm. 452.

illegal and *ultrà vires*, as the attempted conversion in the present case was.

March 14. An application was now made on behalf of the official liquidator to put *Feiling* and *King* on the list of contributories.

Mr. *Baggallay*, Q.C., Mr. *Cotton*, Q.C., and Mr. *C. T. Simpson*, in support of the application:—

The attempted conversion into £20 shares was illegal and ineffectual, the £100 shares therefore remained. *Feiling's* transfer of £20 shares to *Rimington* passed nothing, and *Feiling* must be on the list as holder of his original £100 shares, whatever remedy he may have against *Rimington*. As regards *King*, there could be no forfeiture, except of £100 shares, for no call could be legally made in respect of the £20 shares. The declaration of forfeiture related to non-existent shares in respect of which no call was enforceable; it is, therefore, void, and *King* remains holder.

Mr. *Kay*, Q.C., and Mr. *Tahourdin*, for the creditors' representative, contended that both *Feiling* and *Rimington* ought to be on the list.

Mr. *Mellish*, Q.C., for *Feiling*:—

The argument on the other side would fix *Feiling* with inalienable shares. He transferred in the only way he could, for the directors would not have received a transfer purporting to pass £100 shares. Difficult questions may arise where a splitting of shares has been attempted, but here *Feiling* transferred all he had in the company. The shares may have been improperly called £20 shares, but they are identified in the books of the company as constituent parts of original £100 shares, and the result is, that the deed amounts to a transfer of £100 shares by a description which, assuming it to be incorrect in point of form, is sufficient clearly to identify them; they therefore passed, and *Rimington* is the proper person to be on the list.

At this stage of the argument it was arranged that the case should stand over for *Rimington* to be brought before the Court.

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FEILING'S AND RIMINGTON'S CASE.

KING'S CASE.

May 9, 27. Mr. *Mellish*, Q.C., Mr. *Druce*, Q.C., and Mr. *Marten*, for *Feiling*:—

The Legislature has put no restrictions on the nominal value of shares, it is, therefore, not against the policy of the law that shares should be £20 shares instead of £100 shares. If, then, the Legislature had intended to prohibit turning £100 shares into a larger number of £20 shares, such an intention would have been more clearly expressed. When the statute says "divided into shares of a certain fixed amount," it does not necessarily mean that their amount must be fixed at first and for ever. We contend, therefore, that the conversion into £20 shares was effectual. Creditors could not be in any way affected until transfers were made of shares in numbers which were not multiples of five, and the shareholders are all bound by acquiescence: *Richmond's Case* (1); *Hitchcock's Case* (2); *Nicol's Case* (3); *Bargate* v. *Shortridge* (4). But if the conversion were not effectual the transfer passed the £100 shares, for it must be construed most strongly against the grantor: *Cruise's* Digest (5); and so as to give it some effect. *Rimington*, therefore, must be on the list, and not *Feiling*.

Mr. *Eddis*, for *Rimington*:—

By sect. 38 a person must be a member before he can be a contributory. To make him a member his name must be on the register. Here there never was a register accepted by the Registrar of Joint Stock Companies. The transfer deed could not pass £100 shares, for that was not the bargain; it was intended only to pass £20 shares, and if it did not pass them it cannot, contrary to the intention of the parties, be held to pass something else, because that something else is, in some sense, an equivalent.

Mr. *Mellish*, in reply.

Mr. *Jessel*, Q.C., and Mr. *North*, for *King*:—

Sect. 8, clause 2, of the Act provides that no subscriber to

(1) 4 K. & J. 305.
(2) 3 De G. & Sm. 92.
(3) 3 De G. & J. 387; 5 Jur. N.S. 205.
(4) 5 H. L. C. 297.
(5) 4th Ed. vol. iv. p. 248.

the memorandum of association shall take less than one share; this leads to the inference that a person may hold part of a share. Why should it not be possible for several persons to hold a share as tenants in common, when they clearly may hold one as joint tenants? We contend, then, that the conversion into £20 shares was good.

But, suppose the conversion not good, the books of the company are evidence against it, and it does not lie in the company's mouth to say that the calls were invalid, and non-payment of them no ground of forfeiture. *King* could not have disputed the forfeiture after his acquiescence in the proceedings, and it must be treated as valid. The lapse of time is enough to cure the irregularity: *Knight's Case* (1).

Mr. *Baggallay*, for the official liquidator, in reply in *King's Case*.

June 15. SIR G. J. TURNER, L.J.:—

These are appeals from orders made by the Master of the Rolls in settling the list of contributories of this company, raising some questions of difficulty and importance as to the proper persons to be put upon the list in respect of shares in the company. These questions were more fully entered into and argued in *Feiling's and Rimington's Case* than in the other cases, and the grounds on which our determination in that case is founded will probably be found to apply to all the other cases. It will be convenient, therefore, first to consider that case.

FEILING'S AND RIMINGTON'S CASE.

[His Lordship here stated the 5th clause of the memorandum, the 7th, 9th, 11th, 18th, 19th, and 27th clauses of the articles, the proceedings as to conversion of the shares, and the facts relating to *Feiling's and Rimington's Case*, and continued:—]

This case has come before us upon two applications on the part of the official liquidator. First, an application that *Feiling* might be put upon the list for the ten £100 shares originally held by

(1) Law Rep. 2 Ch. 321.

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FEILING'S AND RIMINGTON'S CASE.

him; and, secondly, an application on his part for liberty to amend the list of contributories in respect of these ten £100 shares, afterwards converted, or alleged to have been converted, into fifty £20 shares, and to place on the list of contributories in respect of such shares both *Feiling* and *Rimington*, or either of them, and for such number of shares, and of such amount, as this Court should direct. In support of these applications it was first contended, on the part of the official liquidator, and in this contention he was supported by *Rimington*, that the directors of the company had no power to convert the £100 shares into £20 shares; that this attempted conversion was *ultrà vires*, and was null and void; and, therefore, that the £100 shares remained unaffected by it, and the holders of them ought to be put upon the list. On the other hand it was contended, on the part of *Feiling*, that the conversion was valid and effectual, and that *Rimington* ought, therefore, to be put upon the list as the holder of the fifty £20 shares. This point must depend, as it seems to me, upon the statute, and the memorandum, and upon the articles, in so far, if at all, as the articles can be called in aid of the construction of the memorandum. The statute, by sect. 8, requires, that in the case of a company limited by shares the memorandum shall state the amount of capital with which the company proposes to be registered, divided into shares of certain fixed amount, and the 12th section is as follows:—[His Lordship read the section.]

Clearly, therefore, as I think, the statute did not warrant the conversion of the shares. On the contrary, this 12th section expressly prohibits any alteration in the memorandum except for the purposes which are specified and referred to in it, and this conversion does not fall within those purposes. It is not difficult, I think, to see the object which the Legislature had in view in thus prohibiting the alteration of the memorandum. The memorandum, by shewing the amount at which the shares were fixed, would indicate to the public the character and position of the shareholders, but if it was allowed to be altered by reducing the amount of the shares, the character of the constituency of the company might be wholly altered. Many persons who might be quite willing to deal with a company whose shares were fixed at £100 would not think of dealing with a company whose shares were

fixed at £1. It was argued, however, that there was power to make this conversion independently of the statute, by force of the memorandum itself which was registered, for that, by the 5th article of the memorandum, the £100 shares were subject to be increased or modified, and that the reduction of the amount of the shares was a modification of them within the meaning of the memorandum; but, in my opinion, the term "modified," as used in this memorandum, was not meant to warrant, and did not warrant, the reduction of the amount of the shares. The memorandum must, I think, be construed with reference to the statute which prescribes it, and the sound construction of the word "modified" used in it appears to me to be to construe it as extending to and authorizing those purposes, other than the increase of shares, to which the same term "modified" is applied in the 12th section of the statute. At all events, I think this word ought not to be construed to have warranted alterations which the statute did not warrant. With respect to the questions which arise on this branch of the case, as to whether the words "increased or modified," contained in the memorandum, apply to the capital or to the shares, and what would be the effect of the registration of a memorandum containing provisions not warranted by the statute, it does not seem to me necessary for us to give, and I do not mean to give, any opinion upon them. As to the articles, I do not see how any of the provisions contained in them can be held to alter the effect of the memorandum in the face of the express prohibition against the alteration of it contained in the 12th section of the Act.

If, therefore, the case rested here, my opinion would be in favour of the contention of the official liquidator that *Feiling* ought to be put upon the list, not, indeed, in respect of the fifty £20 shares, for those shares were not, as I have said, well created, but in respect of the ten £100 shares which he originally held, and which were attempted to be converted into the fifty £20 shares. It was argued for him that, the £20 shares not having been well created, he could never have become a member of the company, and, therefore, as it was said, not a contributory, in respect of any of those shares; and this may well be, but those shares not having been well created, I apprehend he remained a member of the company in respect of his original shares.

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Assuming, then, that *Feiling* would have been liable to be put upon the list if there had been no transfer by him to *Rimington*, the question arises as to the effect of this transfer, and, in my opinion, the effect of it was this, that *Rimington* took under it the ten £100 shares which *Feiling* then had. It is true that the deed purports to transfer fifty £20 shares, and that in consequence of the conversion being invalid there were, in effect, no such £20 shares, but at the time of the execution of the deed of transfer *Feiling* was upon the register as the holder of these fifty £20 shares, and there can be no doubt, therefore, what shares were intended to pass by the deed, and *Feiling* held these shares in lieu and substitution of the ten £100 shares, and he had no other shares in the company. Either, therefore, the deed must have passed these ten £100 shares, or it must have been wholly inoperative; and I have no doubt that, under these circumstances, the ten £100 shares must be held to have passed by the deed. The case is not unlike that of a conveyance of freehold lands when there are no freehold lands to answer the description, but there are leaseholds which answer it, in which case the leaseholds pass, and there are other cases of the same description to be found in *Sheppard's* Touchstone. This case, indeed, is stronger than most of the cases of this description, for here the fifty £20 shares represent exactly the same share and interest in the capital of the company as the ten £100 shares, although under a different denomination. The case was put in argument on the part of *Rimington* as if it had been a question of specific performance, but the purchase in this case was completed by the transfer and by the registration of *Rimington*, and *Rimington* has made no attempt to undo the transaction, nor do I see any ground on which he could attempt to do so with any reasonable prospect of success. I think, therefore, that *Rimington* must be put upon the list in respect of these shares. I apprehend that, in strictness, he ought to be put upon the list for the ten £100 shares, and that the list has not been properly made out in respect of the £20 shares being put upon it, there being, in effect, no such shares; but probably the better course may be to put him on the list for the fifty £20 shares, as representing the ten £100 shares, for otherwise applications may be necessary in similar cases to rectify the register.

KING'S CASE.

[His Lordship, after stating the facts of the case, continued:—]

It was admitted, on the part of the official liquidator, that if the conversion of these shares was valid the forfeiture of them was valid also, and *King's* name ought not to be upon the list; but it was insisted that, the conversion being, as we have held it to have been, invalid, the forfeiture was invalid also, and *King's* name ought to be put upon the list, but I am not of that opinion. The directors, it is true, had no power to make the call, the shares in respect of which it was made not being well created. If, therefore, *King* had disputed the call it could not have been enforced against him, nor could there have been a forfeiture; but here both the directors and *King* proceeded upon the footing that the call was valid, and the forfeiture was declared and submitted to upon that footing. The directors knew, or ought to have known, that the creation of these £20 shares was invalid, and having proceeded to the forfeiture with that knowledge, I apprehend that if they had afterwards sued *King* as a member of the company, in any character, he would have had a good defence against them in equity, at least, if not at law. Having proceeded upon the footing of the validity of the shares, they could not, I think, be permitted to turn round and allege their invalidity. I think, therefore, *King's* name must be taken off the list.

HOLMES'S, PRITCHARD'S, AND ADAMS'S CASES.

Then, as to the shares of *Holmes*, *Pritchard*, and *Adams*, what has been said as to *Feiling's* case will govern these cases also, if in these cases each lot of five £20 shares can be traced up to one of the £100 shares, but if the shares cannot be so traced, I think the parties ought to be at liberty to bring before us any distinction there may be between their cases and that of *Feiling*.

LORD CAIRNS, L.J.:—

The first and principal question in all the cases in the *Financial Corporation, Limited*, now standing for judgment, is, whether the

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conversion of shares in the corporation from £100 shares into £20 shares was valid and effectual. If it was in the power of the corporation, or of the directors, to make the conversion, it is not disputed that the resolutions passed for that purpose were sufficient in point of form.

The corporation was formed and registered as a company whose capital was divided into £100 shares; and all the shares originally taken and allotted in the company were entered in the register of members of the company as £100 shares. It appears, however, that no list of members of the company was ever received by the Registrar of Joint Stock Companies, inasmuch as the first and only copy of the list forwarded to the registrar was after the attempted conversion, and treated the shares of the company as £20 shares, and the Registrar of Joint Stock Companies, on that ground, refused to accept a copy of the list.

The Act provides, with regard to limited companies, that the memorandum of association shall, among other things, state the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount, and that no subscriber shall take less than one share. The Act provides, by sect. 8 and by sect. 12, that, if authorized by its regulations, it may so far modify the conditions in the memorandum as to increase its capital by the issue of new shares, or to divide its capital into shares of larger amount, or to convert its paid-up shares into stock, but no other alteration is allowed; sections 22 and 25 require each share to be distinguished by its number; and by sect. 28, where the capital is consolidated, and divided into shares of larger amount, or converted into stock, notice must be given to the Registrar of Joint Stock Companies.

I am clearly of opinion that under these sections the amount of shares into which the capital is divided must be stated in the memorandum; that these shares must be identified by numbers; that no transfer of less than one share can be made; that no departure from the memorandum by way of lowering the value of, or sub-dividing the shares, can be admitted; and that no person can become a member or corporator except through the ownership of at least one share, which share is to be of at least the amount named in the memorandum. The provisions in the sections to

which I have referred, for the consolidation and increase in the nominal value of the shares, and for the notice to the registrar of such consolidation and increase, seem to me to make more emphatic the prohibition against any change lowering the nominal value of the shares.

There does not appear to me to be much difficulty in discovering, if it be necessary to discover, a reason for this provision of the Legislature. A consolidation and increase of the nominal value of shares preserves the same amount of capital, but may bring it into fewer hands, and may be more beneficial to creditors, by making the capital more easy of collection. But whether this be so or not, every creditor knows, from the express provisions of the Act, that consolidation of shares is an incident to which the company is subject. A subdivision of shares, on the other hand, if valid at all, must be valid to whatever extent it may be carried, and thus creditors of the company may, upon a winding up, be left, and left without any previous notice given to them by the Act of Parliament, with the unpaid capital of the company scattered through such a number of hands that the sum recoverable from each would not pay for the trouble and expense of collection.

The memorandum in the present case states that the nominal capital of the company is £3,000,000, divided into 30,000 shares of £100 each, subject to be increased or modified. And it was contended that the general provisions of the Act did not apply where the memorandum provides in terms for a power to reduce the nominal value of shares. But in the view which I take of the construction of the Act it would not, in my opinion, be competent, even by unambiguous words in the memorandum, to obtain this power of reducing the shares. And even if it were, the words in this memorandum to which I have referred have not, in my opinion, any such meaning. The terms "increased or modified" are meant to apply, as I think, to the "capital;" and the word "modify" would appear to point, not to a decrease of capital, but to some arrangement of capital, in the nature of a partial issue, in the first instance.

It is true that the 7th clause of the articles of association speaks of a division of shares into a larger number of shares of any nominal value authorized by law. It may be difficult to see what was

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intended by these words, but if I am right in the construction which I place upon the Act, with regard to the memorandum, the effect of it cannot be qualified by anything in the articles.

I come, therefore, to the conclusion that the conversion of the £100 shares into £20 shares was invalid.

FEILING'S AND RIMINGTON'S CASE.

FEILING'S AND RIMINGTON'S CASE.

[His Lordship shortly stated the facts of this case, and continued:—]

In order to ascertain the effect of this assignment we are, in my opinion, entitled and obliged to refer to the share register of the company, from which the numbers of these shares are taken. No description of the value of the shares is given in the transfer; and without a reference to the share register the description "shares numbered 19,531 to 19,580" would have no intelligible meaning. And on referring to the share register we find that the shares mentioned in the assignment are treated as the result and product of the conversion of *Feiling's* ten £100 shares, and are identified by number and description with those ten shares.

The question, therefore, appears to me to be, what was the effect of this instrument of transfer? And I am of opinion that it passed to *Rimington*, under the description of fifty £20 shares of particular numbers, the ten £100 shares of *Feiling*, for which the words in the instrument of transfer were, and by the numbers of reference to the share register are shewn to have been, merely a different description. The transfer would, as I think, have given *Rimington* a right to have been entered on the register as owner of *Feiling's* ten £100 shares; and the circumstance that the company did not so enter him, but entered him as owner of fifty £20 shares, cannot, in my opinion, make any difference.

I think *Rimington's* name should be upon the list of contributories as the holder of ten £100 shares, mentioning their original numbers, in the company, being the same as those afterwards called fifty £20 shares, numbered 19,531 to 19,580.

KING'S CASE.

[His Lordship stated the facts of this case down to the declaration of forfeiture, and continued:—]

In these proceedings the provisions of the articles of association, paragraphs 30, 31, 37, 38, 39, and 40, were pursued, but the shares of *King* were throughout referred to as £20 shares. The attempted conversion of the shares being invalid, it would follow that the right to make calls upon, and, if necessary, to forfeit, the shares of *King* in the capital, treating them as £100 shares, would remain; and, on the other hand, *King* might have objected, on the score of irregularity, to any proceedings for forfeiture which described his shares of the capital as £20 shares. *King*, however, who must be taken to have known the true state and description of his shares in the company, made no objection to the forfeiture on the score of this irregularity; but, on the contrary, on the 12th of January, 1865, asked for a remission of the forfeiture as a favour, by a letter which specifically referred to the change in value of the shares. This letter was not complied with, and the winding-up order was made sixteen months afterwards.

In my opinion it must be taken that *King* had waived all objections to the proceedings for forfeiture on the score of irregularity, and it would be impossible to allow the company, or those claiming under the company, now to set up this irregularity as a ground for retaining *King* as a member of the company.

HOLMES'S CASE.

I am of opinion, for the reasons given in *Feiling's Case*, that *Holmes* must be placed upon the list for twenty-five £20 shares, being the five £100 shares formerly held by him; and if the other twenty-five £20 shares can be identified, as it has been said, but not, I think, proved, that they can, with five original £100 shares and can be shewn to have been transferred by a transfer similar to that in *Feiling's Case*, then I think Mr. *Holmes's* name must be put on the list for those twenty-five £20 shares also.

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ADAMS'S CASE.

PRITCHARDS'S CASE.
ADAMS'S CASE.

The liability of these gentlemen must, in my opinion, depend upon the questions whether their £20 shares represent, and can be identified with, in the one case twenty, and in the other case 232 original £100 shares, and whether the assignments were in the form or to the effect in *Feiling's Case*. If these questions are answered in the affirmative, I am of opinion that, although *Pritchard* and *Adams* had no knowledge of the circumstances attending the conversion, they must be taken to have accepted the £20 shares with, and with notice of, all the conditions and incidents to which those £20 shares, as described in the register of the company, were subject; and that what was really assigned to them was, in fact, so many £100 shares, in fragments or portions, as to each, of fifths.

As to the costs in all these cases: the cases are now, after the lengthened arguments and examinations which have taken place before us, in a position very different from that in which they were at the Rolls, and some additional summonses have been brought before us in the first instance, in order that we might be better able to deal with the questions. The difficulty in the cases, moreover, has arisen from the act of the company itself with regard to the conversion of its shares. And I am of opinion, both with regard to the cases which we are now in a position finally to dispose of, and with regard to those as to which a further inquiry may be necessary, all the costs should come out of the estate.

Solicitors for Official Liquidator and Creditors' Representative: Messrs. *Flux & Argles.*

Solicitors for the other Parties: Messrs. *Wright & Venn;* Messrs. *Thomas & Hollams;* Messrs. *Marshall, Westall, & Roberts;* Messrs. *C. & H. Tahourdin.*

In re SUBURBAN HOTEL COMPANY.

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June 17, 27;
July 29.

Companies Act, 1862, *s.* 79, *clause* 5—*Impossibility of carrying on Business—Winding-up.*

The 5th head of section 79 of the *Companies Act*, 1862, is restricted to matters *ejusdem generis* with the four previous heads, and does not authorize the Court to wind up a solvent company, against the wish of the majority of shareholders, because the business has been carried on at a loss, and appears likely to continue a losing concern.

Semble nevertheless, that proof of impossibility of carrying on the contemplated business would justify a winding-up order, even in the absence of insolvency.

THIS was an appeal by the *Suburban Hotel Company, Limited*, from a winding-up order made by Vice-Chancellor *Malins* upon the Petition of Mr. *Pulling*, a holder of 200 shares in the company.

The company was registered on the 12th of January, 1863, as a limited company, with a capital of £50,000, divided into 5000 shares of £10 each. Its objects, as defined in the memorandum of association, were as follows:—

"1st. The purchasing, or taking on lease, or otherwise acquiring, lands, messuages, or buildings, situate in the neighbourhood of *London*, within twenty miles of the *General Post Office*.

"2nd. The erecting on such lands hotels, or converting such messuages and buildings into, or otherwise adapting the same to the purposes of, hotels, with suitable offices and grounds, and the furnishing, stocking, and equipping of such hotels.

"3rd. The carrying on in such hotels the trade or business of hotel or tavern keepers, and livery-stable keepers.

"4th. The selling and the letting of the lands and messuages belonging to the company, or any part thereof, for the purposes of hotels or otherwise.

"5th. The doing of all such matters and things as shall be incidental or auxiliary to the attainment of the above objects, or any or either of them."

3633 shares were taken, and £5 10*s.* per share paid up. The company bought a piece of land from a Mr. *Nicol*, who was paid

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for it partly in cash and partly in fully paid-up shares. On this land the company erected an hotel, called the "*Hampstead Heath Hotel.*" The company commenced business in June, 1863. In one year there was a profit, but upon the whole there was a considerable loss. At the time when the Petition was presented the capital of the company not called up was enough to pay all their debts, and leave a considerable surplus, only £5 15*s.* per share having been called up upon a large part of the shares.

The Petition alleged, among other things, as follows:—"Your Petitioner has discovered, as the fact is, that the concern was carried on at a loss, and that the *Hampstead Heath Hotel* was, is, and must continue to be, a total failure. At a meeting of the directors of the company, held on the 11th of September, 1866, it was resolved that the hotel department be closed, and accordingly the same, with the outbuildings and stabling, has been, and is, permanently closed, and the planned and fitting furniture, and carpets and curtains, have been taken up, and are lying in various parts of the said hotel, without having been packed or stowed away."

When the Petition came on to be heard Vice-Chancellor *Malins* directed it to stand over, in order that a meeting of the shareholders might be held, for the purpose of ascertaining whether they desired the company to continue its business. A meeting was accordingly held on the 27th of May, 1867, at which shareholders, holding in all 3260 shares, attended, out of whom the holders of 2930 voted in favour of going on, and only the holders of 330 voted for winding up. It appeared that of the 2930 shares 1510 were held by Mr. *Nicol* himself, and 750 more by his friends and nominees, and his own shares were fully paid-up shares, given him in part of his purchase-money. A number of affidavits were filed to shew that it was impossible that the business of the *Hampstead Heath Hotel* could be carried on at a profit, and that the hotel had been closed for a year. Counter evidence was given on both points. The Vice-Chancellor considered that the allegations that the business had been discontinued for a year, and that it could not be carried on at a profit, were proved; and, being of opinion that the case was thus brought within the 2nd and 5th clauses of the *Companies Act*, 1862, sect. 79, made a winding-up

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order. The appeal was heard before the late Lord Justice *Turner* and the Lord Justice Lord *Cairns*.

Mr. *Glasse*, Q.C., and Mr. *Buchanan*, for the company:—

This case is concluded by *Lord* v. *Copper Miners' Company* (1), which shews that this Court will not sit as a Court of appeal from the decision of the managing body of a company while they are acting *intrà vires*. The Vice-Chancellor went on the *Companies Act*, 1862, sect. 79, clauses 2 and 5. But on the evidence there was no suspension of business for a year, so clause 2 does not apply. As regards clause 5, it is not to be construed loosely, but according to the principles of *Spackman's Case* (2). A very strong case is required to induce the Court to interfere with the internal management of a company and stop it because a minority think it had better not go on, though when they entered into the company they thereby submitted themselves to the control of the majority: *Re Factage Parisien* (3); *In re Anglo-Greek Steam Company* (4). The case of *In re West Surrey Tanning Company* (5) was a special case, furnishing no general rule.

Mr. *Roxburgh*, Q.C., and Mr. *Leeson*, for the Petitioner:—

On the evidence the business was discontinued from February, 1866, to May, 1867. The *Factage Parisien Case* supports our contention under clause 5. *In re London and County Coal Company* (6) illustrates the same principle. In the case of the *West Surrey Tanning Company* the order was made against the wishes of a majority, because a single shareholder had a preponderating influence, so that there was not an independent majority; neither is there here. The business cannot be carried on at a profit, and that is a ground for dissolution: *Jennings* v. *Baddeley* (7); *Baring* v. *Dix* (8). The case of the *British Oil and Cannel Company*, before Vice-Chancellor *Stuart* (9), is an instance where the Court considered an order to wind up proper, though against the wish of the majority.

(1) 2 Ph. 740, 752.
(2) 1 Mac. & G. 170.
(3) 13 W. R. 214, 330.
(4) Law Rep. 2 Eq. 1.
(5) Law Rep. 2 Eq. 737.
(6) Ibid. 3 Eq. 355.
(7) 3 K. & J. 78, 83;
(8) 1 Cox, 213.
(9) Jan. 25, 1867.

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Mr. *Waller*, for other shareholders.

Their Lordships said they would consider the case, and, if necessary, hear a reply.

July 29. The appeal was now placed in the paper to be disposed of by the Lord Justice Lord *Cairns* alone.

LORD CAIRNS, L.J.:—

For the form of the judgment which I am about to express I, of course, am alone responsible; but it may be a satisfaction to the parties to know that the case was fully considered by my late learned brother and myself, and that we came to the same conclusion, and for the same reasons.

The argument before us was, that the company ought to be wound up, first, because it had ceased to carry on business for a year within the meaning of the 2nd head of the *Companies Act*, 1862, sect. 79; and, secondly, because the case came under the more general words of the 5th head of the same section: "Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

The allegation that the company had ceased to carry on business for a year was, ultimately, almost abandoned in argument, and, in fact, it could not be insisted upon; for, assuming in the Respondent's favour that the closing of the hotel would have been a discontinuance of the business of the company as defined by the memorandum of association, it appears clearly, from the affidavit of the Petitioner himself, that the hotel has not been discontinued for a year, if, indeed, it has been discontinued at all, but that, on the contrary, the carrying on of the business was continued for a year from the spring of 1866 on the motion of the Petitioner himself. If, therefore, there be any ground for winding up, it must be because the case comes under the 5th head of the 79th section.

Now, it is to be observed that the former *Winding-up Act*, 11 & 12 Vict. c. 45, sect. 5, clause 8, contained exactly the same words as those contained in the 5th head of sect. 79 of the present Act, and their meaning came to be considered before Lord *Cotten-*

ham in *Spackman's Case* (1). His Lordship, after pointing out that, in the case before him, there was nothing to shew that the company was insolvent, said:—"The 8th clause of the 5th section of the *Winding-up Act* gives the Court a large discretionary power to wind up a company if it shall see any good reason for so doing. The words are, 'Or if any other matter or thing shall be shewn which, in the opinion of the Court, shall render it just and equitable that the company should be dissolved.' This clause was, no doubt, thus worded in order to include all cases not before mentioned, but of course it cannot mean that it should be interpreted otherwise than in reference to matters *ejusdem generis* as those in the previous clauses. There must be something in the management and conduct of the company which shews the Court that it should be no longer allowed to continue, and that the concern ought to be wound up." What, then, are the matters referred to in the previous clauses of sect. 79 of the Act of 1862? They are these:—First, a special resolution of the company requiring it to be wound up by the Court, which, of course, has no application in the present case. Secondly, the company not commencing business within a year from its incorporation, or suspending its business for a year. That, also, is out of the present case. Thirdly, the members being reduced to less than seven. Fourthly, the company being unable to pay its debts. Those are the first four heads, and the fifth, if it is to be taken to point to something *ejusdem generis*, would, I apprehend, point therefore to something either shewing insolvency, or that which is indicated in the other heads of the section, an incapability of continuing the business for some other reason.

The original Petition having come on before Vice-Chancellor *Malins*, His Honour thought it expedient (and in the wisdom of that course I entirely concur) that there should be a meeting of the shareholders, in order that their views should be ascertained. A meeting for that purpose was held, and the result appears to have been this: the meeting was held on the 27th of May, 1867, and 3260 shares were represented at it; of these, 2930 were against the winding-up, and 330, including, I believe, the shares of the Petitioner, were in favour of the winding-up. There was, there-

(1) 1 Mac. & G. 173.

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fore, an overwhelming majority in favour of going on with the company. It is said that that majority was composed, to a considerable extent, of shares belonging to Mr. *Nicol* and to other persons who concurred with him in his views, and that Mr. *Nicol's* shares were fully paid-up shares, given in return for the property on which the hotel was built, which property he sold to the company; that therefore it was obviously the interest of Mr. *Nicol* that the company should go on, and that the money of those shareholders who had not paid up their shares should be collected for that purpose. Now, it is quite clear that Mr. *Nicol* has a strong personal interest of that kind, but, at the same time, there being nothing to impeach the contract by which he sold his property to the company, I apprehend it must be taken that he is just in the position in which any shareholder would be who had actually paid up the whole money on his shares. He has valid *bonâ fide* shares in the company, and a stake in the company to that amount, and I am not able to discover any reason why any vote which he gives in respect of those shares, or why any vote of any persons who take the same view as he does, should not have full weight in ascertaining the majority or minority in the case.

5 Ch D 678
3 Ch D 187

The wishes, then, of the company, and the provisions of the Act, being such as I have mentioned, I have to see what the allegation is upon which it is proposed to maintain the Petition for winding up. That allegation, as urged at the bar, may, I think, be taken to have amounted to this, that the hotel at *Hampstead* must be considered to be a failure; that is to say, that there has been a considerable loss incurred in carrying it on up to this time, and that, upon the evidence of the witnesses, there is a very high improbability that this hotel can be carried on at a profit. Insolvency is not attributed to the company, the uncalled-for capital being sufficient to satisfy all the debts, and leave a considerable surplus with which the business can be carried on. Now, it is important to bear in mind what is the character of the contract into which, in a case of this kind, the shareholders enter. I apprehend that the contract is of this nature: a certain number of persons are willing to undertake to supply a limited amount of capital upon the terms of the business of the company being confined to certain specified objects, and upon the terms of the affairs

of the company being managed by persons who shall be elected in a particular manner. Provided this end be attained, the persons who subscribe are willing to undertake to supply capital up to a certain point, and to try whether, with that capital so subscribed, the business cannot be managed in a way that will be profitable for every person. They have certain means by which the business can be put an end to. If the requisite majority wish it to be discontinued, a special resolution can at any time be passed to wind up the company. On the other hand, if any of those tests of insolvency, or of the impossibility of carrying on the business, which are mentioned in the 79th section of the Act, occur, then the shareholders have a further right to have the company wound up accordingly. But, subject to the wishes of the majority, and subject to the occurrence of any of those tests which are mentioned in the Act, I apprehend that the contract means that the shareholders will supply the specified amount of capital for the purpose of carrying on the business as long as it can be carried on.

A case might occur where the Court would be willing to give, under the Act, to a minority of shareholders the species of relief that sometimes is given in cases of ordinary partnership where it becomes impossible (I use the word "impossible" in the strict sense of the term) to carry on the business any longer. Some instances of that kind have occurred in cases of ordinary partnership, which were referred to in the course of the argument, and it is right that I should mention them now. The first was *Baring* v. *Dix* (1). There the partnership had been entered into for a certain length of time for the purpose of spinning cotton under a patent which had been obtained, but after several attempts the invention totally failed, and was entirely given up. Notwithstanding, the Defendant *Dix* refused to consent to a dissolution of the partnership, or to sell the lease of the premises, although it appeared that the mills must remain wholly unoccupied, and that the rent would be payable without any profit arising to answer it. Lord *Kenyon* referred it to the Master to inquire and state whether the copartnership business could now be carried on according to the true intent and meaning of the articles of copartnership, and he declared that if the Master should report

(1) 1 Cox, 213.

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that it could not be so carried on, he should dissolve the partnership. The Defendant consented on that intimation to a dissolution. Now, if I may venture to say so, I entirely concur with the course which was there taken. That was a case which manifestly required the interposition of the Court. Two persons had agreed not to manufacture cotton generally, but to join in working under a particular patent. The sole object was to work under a patent supposed to be valid at the time that the partnership was entered into. It turned out to be wholly invalid, and wholly useless. There was, therefore, a complete destruction of the subject matter on which the partnership was to operate. If the Court were satisfied that that was the fact, I apprehend that it would be entirely competent to the Court to dissolve the partnership against the will either of the majority, or, as the case there was, of one of two partners. A case following that, and professing to act upon it, was the case of *Bailey* v. *Ford* (1), where there was a partnership in the business of a chemist and druggist. The partnership was insolvent, and its embarrassments were daily increasing. Under those circumstances the Vice-Chancellor said: "It appears that the affairs of the partnership are daily growing worse, and there is no reason to infer from what is stated in the Defendant's answer that they will ever improve," and he made an order for a receiver, with a view to a dissolution at the hearing. Now, it is not necessary to consider whether the general rule was properly applied in that particular case or not. It might very well be, as it seems to me, that where a copartnership was shewn to be entirely insolvent, even although no creditor had interfered by way of execution or otherwise, the Court might say that it would not allow the embarrassments of the concern to be increased by the contracting of any further debts, and would dissolve the partnership. That might be so in the case of a private partnership, but under the *Winding-up Act* the question could not arise, because everybody agrees that if there is insolvency there is a case for winding up the company. The remaining case which was referred to was a case before Vice-Chancellor *Wood* of *Jennings* v. *Baddeley* (2), where a partnership had been formed to work certain mines. Each partner had contributed the full amount of capital which he was bound to contri-

(1) 13 Sim. 495. (2) 3 K. & J. 78.

bute. The whole amount had been spent, and no profitable working of the mines had accrued after spending the whole of the capital of the partnership. Neither partner was willing to contribute anything more, and the Court held that that was a state of things which made it clear, as a matter of fact, that it was impossible to continue the works of the partnership, and therefore ordered the partnership to be dissolved. I infer that if that had occurred in *Jennings* v. *Baddeley* (1) which occurs in this case, viz., a liability to provide further capital up to a certain amount, His Honour would not have ordered the dissolution which he did order. That case, therefore, established this proposition, and this only, that if there be a complete impossibility of pursuing the partnership business which was contemplated at the time the partnership was made, the Court, in the case of an ordinary partnership, would dissolve it, even without consent. I apprehend that it might very well be (it is not necessary to say more than that) that in the case of a company under the Act of 1862, if the same state of things occurred, even without insolvency, the Court would order the company to be wound up.

Now, applying that to the present case, how do the facts stand? It appears to me to be clearly proved that up to the present time there has been a loss from year to year in carrying on the *Hampstead Heath Hotel*. It also, on the other hand, is not impossible that, with a different course of management, or with different arrangements connected with the hotel, it may be made to bear in public estimation a very different value, and in place of being carried on at a loss, may be carried on at a profit. Or it may be let, or it may be disposed of, and under the memorandum of association other premises may be acquired where the business of an hotel may be carried on to greater advantage. In fact, so long as there is capital which can be expended in acquiring land or renting houses anywhere in the neighbourhood of *London*, within twenty miles of the *General Post Office*, and converting them into hotels, stocking and equipping them as such, it is impossible to say that the capital of the company may not be made productive of profit just in the way in which it was expected to be made productive when the company was formed. It is also to be observed that no

(1) 3 K. & J. 78,

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new fact whatever has occurred, so far as I have been able to discover, since the time the company was formed, and since the time that this property, upon which this very hotel at *Hampstead Heath* has been erected, was acquired, making the position of things with regard to this hotel, or with regard to any other hotel that may be acquired, different from that which existed at the time when the company was formed. I do not think, therefore, that the Court can be called upon to form its opinion on the evidence, and to say, one way or another, that it thinks that the hotel will continue, or will not continue, to be an unprofitable mode of employing capital.

It was said, however, that a series of cases had occurred before different branches of the Court in which the view had been taken, that wherever the Court found that the business was carried on at a loss, and that it was probable that it would so continue to be carried on, the Court would wind up the company. Of course, if that view had been generally taken by the Court, the Court of Appeal would be unwilling to disturb a long course of practice. The cases referred to were those which I am now going to mention. The first was the *Factage Parisien*, which was very much relied on, and which came before the Master of the Rolls and the late Lord Chancellor *Westbury*. When it came before the Master of the Rolls (1) it appeared that there had been an average weekly loss of between £500 and £1000. Then a new manager was appointed, and certain different arrangements were made, and the expenses were greatly reduced, but still the average weekly losses amounted to £100 or £150. The nominal capital was originally £200,000, divided into 10,000 shares of £20 each. About 1000 shares remained unissued. The assets of the company at the time of the hearing consisted of uncalled capital to the amount of £62,000 and upwards, unpaid calls to the amount of £19,000 and upwards, and stock and plant of considerable value. There was a Petition presented by seven shareholders for a winding-up order, and what the Master of the Rolls said was this: "The principle upon which it appears to me that the Court ought to deal with these cases of limited companies is a very simple and plain one. It is clear that they stand on a very different footing from unlimited com-

(1) 13 W. R. 214.

panies. If they are carrying on business at a manifest loss, and it is totally impossible to make any profit, it can scarcely be said that this Court will consider it just and equitable that the company should be allowed to continue when the persons who have embarked property to a considerable amount in it do not wish it to go on, and the Court sees that if the whole of the capital be involved no benefit whatever can be derived from it. It appears to me to be clear that in any case of a limited company, where the original speculation is a failure, it is just and equitable for the Court to interfere and say, 'You shall not spend any more money of the persons engaged in the undertaking who do not wish to peril any more money in the concern.' It is quite distinct from saying that it is a case of an insolvent company; for, *ex concessis*, it is not insolvent. It is very different from saying that a company cannot pay its debts, because the persons managing it will take care to have all the debts paid by making calls to meet them, and thereby prevent the difficulty from arising." Then further on his Lordship said: "My opinion is that when these cases arise the Court should interfere and say, at the instance of the shareholders, that a case has been made out for winding up the company." Then his Lordship pointed to suggestions which had been made that a new system of management might be introduced, and that the body of shareholders were desirous of trying it, and that it was very reasonable that the Court should give them an opportunity of seeing whether their expectation could be realised. "What I propose, then," finally his Lordship said, "is, that the petition should stand over till the second day of petitions in Hilary Term, and that, in the meantime, a meeting of the shareholders should be called, that they may come to some resolution which may then be submitted to me." That offer was refused, and, therefore, the order for winding up was made. Now, stopping with the decision of the Master of the Rolls, it appears to me that the view which his Lordship took was this, that when the Court was appealed to in a case such as he described, it was right to ascertain what the body of shareholders at large desired, and to give them an opportunity of saying—the matter being brought to their notice, and the losses that had occurred being before them—whether they would, notwithstanding, desire the company to go on. I cannot understand the offer which

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his Lordship made as leading to any other conclusion than what I have mentioned, because if his Lordship was of opinion that the minority, against the wishes of the majority, had a right to have the company wound up merely because of its being unprofitable, then, I apprehend that no order directing a general meeting to be called, and their opinions to be taken, would have been made. However, the offer for calling the general meeting having been refused, the order for winding up was made. Thereupon an appeal was brought before Lord *Westbury*. The report states that in the first instance, when the Petitioner came before the Lord Chancellor, he ordered that a meeting of the shareholders should be called to consider whether it was expedient that the company should be wound up, and that in the meantime the Petition should stand over. A meeting was accordingly convened by advertisement, when it was resolved that it was not expedient that the company should be wound up. Thereupon the counsel for the Petitioners submitted that the meeting was not properly constituted, and that it was not known whether all present were shareholders who had paid their calls, that there was no one present to state the case of the Petitioners, and that the Petition should again stand over that the question might be properly discussed. The Lord Chancellor said that he could not accede to the application—that if there was no discussion it was attributable to the wilful absence of the shareholders, and the notice was sufficient—that if he saw any probability that the alteration in the management would be inconsistent with the terms of the formation of the company he might be disposed to interfere, but that the whole controversy had arisen out of the system of management, and that there was nothing to prevent the new system of which the shareholders approved being tried—that it was not a case (the company being solvent), in which he could exercise his discretionary power under the *Winding-up Act;* he should, therefore, in form, discharge the order of the Master of the Rolls, but in doing so he, in reality, affirmed his Lordship's decision. By the last observation I understand the Lord Chancellor to mean that he took the course which he understood the Master of the Rolls was willing to have taken, but which was refused by those who represented the company. The result was this, the Lord Chancellor thought that,

these two things concurring, the company being solvent, and the company having, at a general meeting, expressed their wish that the business should be carried on, it was not a case in which he could exercise his discretionary power under the *Winding-up Act.* That case, therefore, so far from being an authority for the Petition in the present case, seems to me to be an authority against the Petition, having regard to the wishes of the company, which have been ascertained during the pendency of the Petition. The next case referred to was the case of the *Anglo-Greek Steam Company* (1). The precise point there decided by the Master of the Rolls was, that the misconduct of the directors and of the managers of the company, though it might render them liable to a suit, was not a ground upon which the Court would consider it just and equitable to wind up the company. But his Lordship made these important observations. He said (2), "There are five different rules laid down in sect. 79, and the four previous rules are these." Then he enumerates the four previous rules which I have already mentioned. "Then the fifth is, 'Whenever the Court is of opinion that it is just and equitable that the company should be wound up.' In that case Lord *Cottenham* laid down, and I have followed him, and all the other Courts I think have done the same, that these words are to be considered as referring to matters *ejusdem generis* with the four subject matters previously stated in the four previous rules. At the same time I am of opinion that this principle would be satisfied if it were established that the company never had a proper foundation, and that it was a mere fraud, what is commonly called a bubble company" (which, of course, does not apply to the present case). "In that case the Court would consider that it came within the fifth rule. In this case, as none of the four first rules apply, it becomes necessary to examine into the constitution of the company to see whether anything can be made out in respect of the fifth rule, which would induce the Court to wind it up. As far as the evidence allows me to judge, coupled with my very limited knowledge of the subject itself, I should judge favourably of the plan of this association, provided it were carried on in a *bonâ fide* manner, and not with money got together by large discounts and mulcted by heavy commissions." His

(1) Law Rep. 2 Eq. 1, 12 Jur. (N.S.) 323. (2) Law Rep. 2 Eq. 5, 12 Jur. (N.S.) 323.

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Lordship, therefore, professed to follow the general rule laid down by Lord *Cottenham*, and to hold that the 5th head of the 79th section of the Act did not give the Court a loose discretion which might be exercised whenever the Court thought the speculation not a very profitable one, but that the Court must proceed upon some definite reason, *ejusdem generis* with the four reasons previously specified in the 79th section.

The other case referred to was the *West Surrey Tanning Company* (1), but that really has little bearing upon the present case, because there there had been a special resolution passed for a voluntary winding-up of the company, and the only question was, whether the voluntary winding-up should be continued, or an absolute order made for winding-up the company by the Court. His Honour, adverting to the general character of the company, and to its being in substance what the Master of the Rolls termed a bubble company, thought that it should not be left to a voluntary winding-up, but should be wound up by the Court. There the Court had the *constat* that the company itself, by a proper majority, desired that it should be wound up, and therefore that case has no application to the present.

I am, therefore, unable to find that any larger rule has been laid down, and I certainly do not think it desirable now to lay down a larger rule than that laid down by Lord *Cottenham* and followed by the Master of the Rolls in the case of *The Anglo-Greek Steam Company* (2), that if there be insolvency, or anything which is equivalent to a test of insolvency, if there be the circumstances that the company has not for a certain time commenced business, or has suspended business, that is a test given to the Court by which to prove that the business cannot be carried on, and in those cases the company may be wound up. It is not necessary now to decide it; but if it were shewn to the Court that the whole *substratum* of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the Court might, either under the Act of Parliament, or on general principles, order the company to be wound up. But what I am prepared to hold is this, that this Court, and the winding-up process of the Court, cannot be used, and ought not to be used, as the

(1) Law Rep. 2 Eq. 737. (2) Law Rep. 2 Eq. 1,

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means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation. This company may become successful, or may continue to be unprofitable, as I believe it has hitherto been; and it may, therefore, hereafter re-appear in this Court under different circumstances, but it is not for this Court now to pronounce, and, above all, not for this Court to pronounce on opinion-evidence, that this is likely to be an unprofitable speculation; and that, therefore, at the wish of a minority of shareholders, against the will of a large majority, the company should be wound up and put an end to.

I think, therefore, with great respect to the Vice-Chancellor, that the order for winding up the company cannot be maintained, and the Petition must be dismissed. I think that it is always desirable, unless there are distinct and special circumstances, not to depart from the general rule, that the unsuccessful party should bear the costs of litigation. There are, in my opinion, no special circumstances in this case, and I think that the Petition must be dismissed with costs.

Solicitors: Mr. *W. G. Colley;* Messrs. *Goodman & Morley;* Mr. *A. T. Cox.*

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1867
August 5.

Conversion—Tenant for Life and Remainderman.

A testator directed his executors to convert his personal estate when and in such manner as they should see fit, and gave them power to sail his ships for the benefit of his estate, till they could be satisfactorily sold. He gave his residuary estate to tenants for life, with remainders over, and gave his executors power to invest at their discretion, or allow to remain as then invested, all his funds in certain specified shares and securities. His ships gained considerable earnings after his death; and he had, at his decease, large sums invested in such shares and securities as he had specified, and large sums invested in shares and securities of other descriptions, and not proper for the investment of trust moneys:—

Held (affirming the decision of the Master of the Rolls), that the tenants for life were not entitled to the earnings of the ships as income; but (varying that decision) that they were entitled to interest at £4 per cent. on the value of the ships from the testator's death:

Held (reversing the decision of the Master of the Rolls), that the tenants

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for life were entitled to the actual income of so much of the estate as was invested in such shares and securities as were mentioned by the will as proper investments:

Held (affirming the decision of the Master of the Rolls), that the tenants for life, as regarded the unauthorized investments, were entitled only to an income from the testator's death equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the death, and not as in *Robinson* v. *Robinson* (1) to an income equal to interest at £4 per cent. on their value.

DUNCAN DUNBAR, the testator in the cause, left a long and complicated will in his own handwriting, executed on the 13th of July, 1859, the material parts of which, for the present purpose, were as follows:

"I leave all my property, personal or freehold, of whatever description, in trust to *William Smith Brown*, of the *East India Road*, and *Edward Gellatly*, clerk in my counting-house; giving them full power, except as hereinafter provided, to realize the same when and in such manner as they may see fit, without being personally responsible for such realization—to sail my ships for the benefit of my estate until they can be satisfactorily sold, without being responsible for any loss on any voyage—to sell my ships by public or private sale, and for the following purposes——"

(The testator then made some specific gifts, and gave a number of large pecuniary legacies, among which was a legacy of £20,000, which he directed his trustees to set apart and invest, and pay the income to his sister, Mrs. *Masson*, for her life, then to her three daughters for their lives, and then divide the capital among the children of the daughters. He gave another £20,000 in trust for the children of his late sister, *Helen Abbott*; another £20,000 in trust for his sister, *Phœbe Dunbar Dunbar*, for life, with remainder to her children; and another £20,000 in trust for his niece, *Phœbe Brown*, for life, with remainder to her children.)

"As I know the winding-up of my estate will require much time and care, I leave the period of the payment of the above legacies entirely to the discretion of my executors."

* * * * * * *

"The residue of my estate I wish divided amongst *Margaret*

(1) 1 D. M. & G. 247.

Masson and her daughters subject to the aforesaid trust declared in regard to the legacy of £20,000, to the children of *Helen Abbott*, to *Phœbe Dunbar Dunbar* and her children, and to my niece, *Phœbe Brown*, and her children, in four equal shares, and subject to the same trusts as the legacies of £20,000 left in former parts of my will."

"I declare *William Smith Brown*, of *East India Road*, and *Edward Gellatly*, of *Limehouse*, executors to this my last will and testament; and I give them full power to employ competent clerks, and to incur all reasonable expenses; and I direct the sum of £2000 to be equally divided betwixt them, in addition to former legacies; and I give them full power to invest at their discretion, or allow to remain as at present invested, all my funds in government and colonial government securities, guaranteed railway stock and debentures, *East India* bonds and stock, marine insurance shares, and shares in the *London Chartered Bank*."

The will had settled many of the legacies, with express directions to invest them. But there were no directions as to the nature of the investments, except in the last clause, set out above.

The testator died on the 6th of March, 1862, and was, at his death, carrying on business on a large scale as a shipowner and merchant.

The ships which he owned at his death were nearly all of them out on voyages. The rest sailed after the testator's death. The result was a large profit.

The testator, at his death, possessed a large amount of such stocks, shares, and securities, as were mentioned in the last clause of his will. These, to a considerable extent, remained unconverted. He also, at his death, possessed a large amount of stocks, shares, and securities, not coming under any of those descriptions, and not being proper investments for trust moneys. These also, to a great extent, in consequence of the delays necessarily incident to realizing a very large and diversified property, remained unconverted.

In working out the accounts and inquiries directed by the order on further consideration, in a suit to administer the trusts of the will, questions arose between the tenants for life of shares of the

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residue and the persons entitled in remainder, with respect to the above descriptions of property; and a summons was taken out to take the opinion of the Master of the Rolls upon them, which having been adjourned into Court, his Lordship made an order declaring his opinion, which was in part as follows:—

"1. That the profits of the said ships, and the dividends and profits produced by the said securities remaining unsold after the testator's death, are to be considered as part of the capital of the testator's estate, and added to the price or value of such ships and securities respectively."

"2. That for the purpose of ascertaining the profits of the ships, all expenditure and debts incurred on account of the ships respectively, down to the time of the commencement of their respective voyages, are to be considered as paid or incurred generally on account of the estate of the testator, and that such debts, so far as the same were not paid by the testator in his lifetime, ought to be paid out of the testator's estate generally, and that all expenditure and debts paid or incurred by the respective masters of the ships, or otherwise paid or incurred for the purposes of sailing the ships on their respective voyages, from and after the time of the commencement of such voyages respectively, are to be considered as paid or incurred out of the earnings of the said ships respectively, and are to be deducted accordingly from the profits of the ships.

"3. That the loss to the estate by sailing any ship is to be borne by the estate generally.

"4. That the amount of the net proceeds of the sale of each ship, augmented by the net profits (if any) of such ship after the testator's death, are to be considered as laid out on the 6th day of March, 1863, being the expiration of one year, in the purchase of Bank £3 per Cent. Annuities.

"5. That the amount of the net proceeds of the sale of such of the said shares, debentures, and other securities as shall be proper to be sold, augmented by the dividends and profits produced thereby respectively, and the estimated value on the 6th day of March, 1863, of such of the said securities as shall not be proper to be sold, augmented by the dividends and profits produced thereby, down to the said 6th day of March, 1863, respectively, be

considered as laid out on the 6th day of March, 1863, in the purchase of Bank £3 per Cent. Annuities.

"6. That so much Bank £3 per Cent. Annuities as could have been purchased upon the said supposed investment, be considered as belonging to the testator's estate on the 6th day of March, 1862, being the day of his death, in lieu of the said ships and shares, debentures, and other securities.

"7. That the tenants for life, under the will of the said testator, of the residue of the estate thereby given, be considered entitled to receive as income of such residuary estate, in lieu of any profits of the said ships, and in lieu of any dividends or profits of the said shares, debentures, and other securities, such sum as will equal the dividends which would have accrued from and after the testator's death on the said supposed Bank £3 per Cent. Annuities, if the same had belonged to his estate at the time of his death."

The order went on to direct an inquiry which of the shares, debentures, and securities, ought, and which of them ought not, to be sold.

The tenants for life appealed.

The *Solicitor-General* (Sir *C. J. Selwyn*), Mr. *Joshua Williams*, Q.C., and Mr. *Wickens*, for one of the tenants for life:—

The testator has authorized the trustees to postpone the sale of the ships. So long as it is postponed they are an authorized investment, and the tenants for life are entitled to their earnings as income: *Green* v. *Britten* (1); *Maclaren* v. *Stainton* (2). The Master of the Rolls was embarrassed by *Dimes* v. *Scott* (3), and *Morgan* v. *Morgan* (4); but those were cases where there was a duty to convert at once, and therefore have no application. If, however, we are not entitled to the earnings, we are entitled to £4 per cent. interest on the value: *Meyer* v. *Simonsen* (5).

As to securities of such a description as the testator authorized his trustees to invest upon, the tenants for life must have the whole income. For the purposes of the particular will, money

(1) 1 D. J. & S. 649.
(2) 3 D. F. & J. 202.
(3) 4 Russ. 195.
(4) 14 Beav. 72.
(5) 5 De G. & Sm. 723.

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vested on a security which the testator approves as a proper investment, stands in the same position as if invested in consols. *Caldecott* v. *Caldecott* (1), and *La Terrière* v. *Bulmer* (2), support us on this point, as regards the first year, if authority be wanting.

As to the moneys invested by the testator on securities on which he does not authorize their being retained, and as to the moneys on authorized securities, if the Court is against us on the last head, we say that we ought to have interest at £4 per cent. on the value at the end of a year from the death, and not merely an income equal to the dividends arising from an imaginary investment in consols, the case being one in which the trustees had a choice of investments. *Robinson* v. *Robinson* (3) is a clear and express authority for allowing £4 per cent. in such a case, though the point is not mentioned in the marginal note. *Baynard* v. *Woolley* (4) is to the same effect, and *Meyer* v. *Simonsen* (5), is the same in principle. In *Dimes* v. *Scott* (6), the point was not argued, for, according to the price of consols at that time, the tenant for life would get more than £4 per cent. by the plan which was adopted (7).

Mr. *Druce*, Q.C., and Mr. *F. C. J. Millar*, for another tenant for life.

Mr. *Prendergast*, Q.C., and Mr. *Rendall*, for the parties entitled in remainder:—

As to the ships, *Green* v. *Britten* (8) is inapplicable, as there is not here any prohibition of conversion for a particular time, and the ships are to be sailed "for the benefit of the estate."

As to what are called authorized securities, the ultimate clause is only intended to provide for interim management until con-

(1) 1 Y. & C. Ch. 312, 737.
(2) 2 Sim. 18.
(3) 1 D. M. & G. 247.
(4) 20 Beav. 583.
(5) 5 De G. & Sm. 723.
(6) 4 Russ. 195.
(7) The testator died on the 30th of January, 1802; and for the next twelve months the prices of consols in the successive months, given in the *Annual Register*, were as follows:

Feb.	69⅞ .. 68⅛	Sept.	70¼ .. 67
Mar.	70⅝ .. 67½	Oct.	70 .. 67¼
Apr.	77¼ .. 70⅝	Nov.	68¼ .. 67⅜
May	76⅞ .. 72½	Dec.	72⅝ .. 66⅛
July	74⅜ .. 70⅜	Jan.	71⅝ .. 69⅞
Aug.	72 .. 66		

(8) 1 D. J. & S. 649.

version could be made, not to point out additional modes of permanent investment. *Gibson* v. *Bott* (1), therefore applies.

As to the investments or securities not mentioned in the last clause of the will, *Dimes* v. *Scott* (2), *Taylor* v. *Clark* (3), and *Morgan* v. *Morgan* (4), ought to be followed, and the tenants for life should receive, not interest at £4 per cent. on the value, but the income which would have been produced if the funds had been invested in consols at the end of the year.

LORD CAIRNS, L.J.:—

I do not think, Mr. *Solicitor-General*, that there is any point on which I need hear you in reply. There are three questions in the case; the first, as to the ships; the second, as to what I will term the authorized securities; and the third, as to the securities which are not authorized by the will

With regard to the ships, I think that the case of *Green* v. *Britten* (5) does not apply. In *Green* v. *Britten* there was an absolute prohibition against converting the ships for seven years, except in an event which did not happen, and the Court, resting upon the prohibition, held that it was a sufficient warrant for giving to the tenant for life the income which those ships earned during the seven years. It is not necessary here to consider whether that was a correct construction or not; it is enough to say that the principle on which the Court proceeded does not apply to the present case, in which we find no indication whatever of an intention that the ships were to remain unconverted for any specific time. The testator, who had been engaged in the shipping business, knew perfectly well, and shews that he knew, that some time would necessarily be taken in converting the ships, and therefore he very wisely provided that until they were sold the executors should have a power which otherwise they would not have possessed, namely, the power to sail the ships for the purpose of making profit, but in giving that power, he does not give it as a power to be exercised for the benefit of the tenant for life as against the parties in remainder, or for the benefit

(1) 7 Ves. 89, 96.
(2) 4 Russ. 195.
(3) 1 Hare, 161.
(4) 14 Beav. 72.
(5) 1 D. J. & S. 649.

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of the parties in remainder as against the interest of the tenant for life, but says that it is to be exercised for the benefit of the estate, meaning, as I apprehend, for the benefit of the estate generally, without disarranging the equities between the successive takers.

I think, therefore, that with regard to the ships, the testator put them simply in the position of property which was to be converted cautiously, and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which, when converted, was to be invested, and when invested, to be enjoyed as the residue of his estate.

In that state of things, it seems to me that the case falls exactly within the third division pointed out by Sir *James Parker* in the case of *Meyer* v. *Simonsen* (1), and that a value must be set upon the ships as at the death of the testator, and the tenant for life must have 4 per cent. on such value, and the residue of the profits must of course be invested, and become part of the estate.

Then, secondly, as to the authorized securities. By those, I mean the securities which are specified in the last clause of the will, government and colonial government securities, guaranteed railway stock and debentures, *East India* bonds and stock, marine insurance shares, and shares in the *London Chartered Bank*. The first thirteen items in the list of securities contained in the statement submitted to the Master of the Rolls, are admitted to come under one or other of those descriptions. In my opinion, according to the construction of the will, the executors have full power to retain upon those securities, for as long as they think it advantageous, the money invested by the testator in those securities, or to invest upon securities of any of those descriptions the money obtained by the conversion of any part of the testator's estate, and while any such securities form part of the testator's estate the tenant for life is, in my opinion, entitled to the specific income of the securities, just as if they had been £3 per Cent. Consols. I understand the words of the will as amounting to the constitution by the testator of a larger class of authorized secu-

(1) 5 De G. & Sm. 723.

rities than this Court itself would have approved of, and the Court has merely to follow his directions, and treat the income accordingly, as being the income of authorized securities.

Then comes the third question in the case, the securities not ranging themselves under any of those mentioned in the last clause of the will. They appear to have been securities possessed by the testator himself, but that, I think, makes no difference; as they do not come within the class of authorized securities it was the duty of the trustees to convert them at the earliest moment at which they properly could be converted. I do not mean to say that the trustees were by any means open to censure for not having converted them within the year, but I think that the rights of the parties must be regulated as if they had been so converted. I think the proper order to make is that which was made in *Dimes* v. *Scott* (1), followed by Vice-Chancellor *Wigram* in the case of *Taylor* v. *Clark* (2), namely, to treat the tenant for life as entitled, during the year after the testator's death, to the dividends upon so much 3 per cent. stock as would have been produced by the conversion and investment of the property at the end of the year. This will involve a variation of the order under appeal as to those securities, since it proceeds upon a somewhat different footing, and aggregates the amount produced by conversion at the end of the year with the dividends produced during the year, which is not precisely in accordance with *Dimes* v. *Scott*, and *Taylor* v. *Clark*.

MINUTES:—Vary the order of the 6th March, 1867, except so far as the same directs the inquiry therein mentioned, the same, as varied, to be as follows:—With regard to the earnings of the testator's ships, and to the dividends and profits produced by the shares, debentures, and other securities mentioned in the schedule hereto, of which the testator was possessed at the time of his death, as between the tenants for life and the persons entitled in remainder under the residuary gift in the testator's will, declare as follows:—

1. That a value ought to be put upon the ships, as at the death of the testator, and that the tenants for life are entitled to 4 per cent on the amount of such value from the day of the death of the testator, and the residue of the profits ought to be invested, and form part of the testator's estate.

2. That the tenants for life are entitled to the income actually arising from the

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(1) 4 Russ. 195. (2) 1 Hare, 161.

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securities mentioned in the first part of the schedule hereto. [The authorized securities.]

3. That as to the several securities belonging to the testator, mentioned in the second part of the said schedule [the unauthorized securities], the tenants for life are entitled as from the 6th March, 1862, the day of the testator's death, to the interest of so much Bank £3 per Cent. Annuities as the amount that would have been realized by a conversion thereof at the end of the year after the death of the testator would have purchased at the end of the year.

Costs of all parties out of the estate.

Solicitors for the Plaintiff: Messrs. *Waltons & Bubb.*
Solicitors for other Parties: Messrs. *Gellatly, Son, & Warton.*

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June 8, 10, 11;
July 17.

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Colourable Sale—Purchase under Act of Parliament—Sale or Gift—Sanction of Court of Chancery—Parliamentary Entail—Restraint on Alienation—Recital in Act, when a Confirmation.

Certain parts of estates which, by an Act of 1719, were entailed on the Earls of *Shrewsbury*, with a proviso prohibiting alienation, were, by an Act of 1803, vested in trustees in trust for sale. The moneys were to be paid into the Court of Chancery, and to be invested under the direction of the Court in the purchase of land to be settled to the same uses and subject to the same restraint on alienation as the rest of the estates. In 1824, Earl *C.*, the then Earl, entered into an agreement with the trustees to sell them estates worth about £90,000 for £1000 out of the fund in Court. The sanction of the Court of Chancery was obtained, and the transaction was completed in 1834 under the direction of the Court by Earl *J.*, the next Earl, who conveyed the estates to the uses declared by the Act of 1719, along with about £40,000 worth of lands not included in the agreement. Earl *B.*, the next Earl, disentailed all the lands which he had power to disentail, and died leaving a will by which he devised them to the Plaintiffs, who filed their bill to recover them from the present Earl:—

Held, affirming the view of the Master of the Rolls on this point, that the Court of Chancery had jurisdiction, for that the Plaintiffs, assuming them to have a legal title, were in equity entitled to recover only on the terms of restoring the £1000, which was a lien on the estates; and that, moreover, the circumstances that the conveyance of 1832 appeared on the face of it to be regular, and to be made under the direction of the Court of Chancery, would embarrass the Plaintiffs in proceeding at law:—

Held, reversing the decision of the Master of the Rolls, that the Plaintiffs were entitled to recover the estates, for that the Act of 1803 only authorized estates which were *bonâ fide* purchased to be brought within the restraint on

alienation, that the transaction of 1832 was a gift under colour of a sale, and that the settlement then made was a voluntary settlement to which the parliamentary restraint on alienation did not attach, and that the disentailing assurance and devise by Earl *B.* effectually passed the fee in them to the Plaintiffs.

THIS was an appeal by the Plaintiffs from a decree of the Master of the Rolls dismissing their bill with costs (1).

In the year 1719 an Act of Parliament, 6 Geo. 1, c. 29, was passed, which settled the estates of the then late Duke of *Shrewsbury* on *Gilbert* Earl of *Shrewsbury*, with remainder to his first and other sons in tail male, and in default of such issue to the issue male of the body of the first Earl of *Shrewsbury* to whom the Earldom should descend severally and necessarily in tail male to attend and wait upon the Earldom, and to be annexed to, and descend with the same. And it was enacted that none of the persons to whom any estate of inheritance in the lands should descend should alienate the estates or any part of them, with a proviso modifying this restriction in favour of Protestant Earls. The Act conferred powers of jointuring to the extent of £2000 a year, of leasing, and of raising portions, but contained no power of sale or exchange.

In 1803 an Act, 43 Geo. 3, c. 40, was passed, intituled "An Act for vesting Part of the Settled Estates of the Right Honourable *Charles* Earl of *Shrewsbury*, in the Counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, in Trustees to be sold, and for laying out the Moneys to arise by such Sale in the purchase of other Lands and Hereditaments to be settled in lieu thereof to the same Uses and subject to the same Restrictions."

The preamble of the Act, after stating the Act of 6 Geo. 1, and setting out the title of *Charles* Earl of *Shrewsbury*, recited that certain parts of the settled estates in the counties of *Salop*, *Chester*, *Berks*, *Wilts*, and *Oxford*, were remote from the principal estates, and as most parts of the estates in the said counties would sell to great advantage, it would be greatly for the benefit of the said Earl, and those entitled in remainder after him under the limitations in the settlement and Act of Parliament, if all the estates in the counties of *Salop*, *Chester*, *Berks*, and *Wilts*, and

(1) Law Rep. 3 Eq. 218.

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certain detached parts of the estates in the county of *Oxford*, were sold; and that it was desirable to purchase and acquire other estates in the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, which lay more convenient and advantageous to be enjoyed with the bulk of the Earl's estates, but by reason of the restrictive clause contained in the Act of Parliament, the said Earl, although tenant in tail in possession of the said estates, was deprived of the powers by law incident to an estate tail, and the salutary purposes before mentioned could not be effected without the aid and authority of Parliament, and the 1st section vested certain estates mentioned in the schedule annexed to the Act in trustees for sale, and after providing, by the 2nd section, for the payment out of the purchase-money of the costs, charges, and expenses of obtaining the Act, and of the sales, it was enacted, by the 3rd section, that all the residue and surplus of the moneys to arise by the sales might be invested by the trustees, by or under the order and direction of the Court of Chancery, in the purchase of freehold and copyhold estates within the counties of *Oxford*, *Worcester*, *Stafford*, and *Chester*, and other neighbouring counties, the copyholds not to exceed one-sixth part of the value of the freeholds, and the estates so purchased to be settled to the same uses, and to be under the same restrictions from alienation, as the estates authorized to be sold stood settled and limited under the settlement and Act of Parliament.

In the year 1824, various sales having been made under this Act, there was in Court, the produce of them, £5200 in Exchequer bills, and £7182 17*s.* 11*d.* in money.

Earl *Charles* who, besides his interest in the settled estates under the Act of Parliament, was the owner of large fee simple and entailed estates, was desirous of adding these estates to the entail under the Act, in order to annex them to the title. He accordingly entered into an agreement with the trustees under the Act of 1803 by which they agreed to purchase of the Earl certain estates mentioned in the schedule to the agreement for the sum of £1000, being part of the money arising from the sales of the lands in settlement.

The estates which formed the subject of this agreement were worth about £89,000. Before applying to the Court to carry this transaction into effect, a case was submitted on behalf of Earl

Charles and the trustees to Mr. *Shadwell*, the statements in which were in part as follows:—

"The Earl of *Shrewsbury* is possessed of considerable fee simple estates in each of the latter counties, and is desirous of settling them in the same manner as the estates at present annexed to the Earldom of *Shrewsbury* by the Act of the 6 Geo. 1, recited in the accompanying Act, are settled by that Act, and with a view of effecting that object has proposed to the trustees under the accompanying Act to convey the estates in question to them for a trifling consideration, say one or two thousand pounds, though they are worth more than twenty times that amount, but previous to incurring the expense of an application to the Court of Chancery for reference of the titles, &c. to the Master (the course adopted in all purchases by the trustees), His Lordship and the trustees wish to be advised whether the Court would sanction such a course of proceeding, or whether it would be deemed an invasion of the general laws against permanent restrictions from alienation, and if the Earl were to convey to the trustees it would be in the power of the heir-at-law of the Earl to dispute it, and set the conveyance aside. Your opinion is therefore requested whether the object of the Earl of *Shrewsbury* can be securely effected in the manner proposed, or in any other and what mode."

Mr. *Shadwell* having advised an application to the Court, the trustees presented a Petition which stated the amount of Exchequer bills and money in Court, and the proposal of Earl *Charles* to sell and dispose of the estates and lands comprised in the agreement to be conveyed to the uses and subject to the limitations and restrictions from alienation in the Act of 6 Geo. 1, for the sum of £1000, part of the £7182 17*s.* 11*d.* "being a much less sum than the said hereditaments are fairly worth to be sold, and being consequently a very advantageous purchase wherein to invest the said sum of £1000," and that the Petitioners had accordingly contracted and agreed with the Earl for the absolute purchase of the estates and hereditaments at the aforesaid price, and praying a reference to the Master whether the estates and hereditaments were a fit and proper purchase wherein to invest the said sum of £1000.

The Petition came on before Lord *Gifford* on the 11th of August,

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1824, Mr. *Shadwell* appearing for the Petitioners, and Mr. *Tinney* for Earl *Charles*. On Mr. *Tinney's* brief was the following memorandum signed by him: "Mr. *Shadwell* stated that the difficulty suggested was, that if the estates were not sold at their full value it might tend to create a perpetuity beyond the purview of the Act, but he said the Act of *George* III. did not prohibit the trustees from making an advantageous bargain, and the perpetuity would be only such a perpetuity as the Acts sanctioned." Mr. *Shadwell's* brief was indorsed, "Ord$^{d.}$ upon stating the point to his L$^{dp.}$"

An order was accordingly made referring it to the Master to inquire and state to the Court whether the estates and hereditaments were worth the sum of £1000, and whether they were fit and proper purchases wherein to invest the said sum of £1000, and the Master was to be at liberty to state any special circumstances.

Nothing was done upon this order during the life of Earl *Charles*, who died on the 6th of April, 1827, but after his death the matter was taken up by his successor Earl *John*, and on the 11th of November, 1831, a state of facts was carried in before the Master, containing a statement of the Acts of 6 Geo. 1, and of 43 Geo. 3, and of the agreement for the purchase from Earl *Charles* by the trustees.

Amongst the estates stated to have been agreed to be purchased "the moiety of the manor or lordship of *Newport*, in the county of *Salop*, with the whole of the tolls of the market, and *Salters' Hall*, in the borough of *Newport*," were mentioned, but which were, in fact, not included in the agreement. By the schedule to the state of facts, it appeared that the number of acres for which the £1000 was to be paid was 1983A. 0R. 37P.

On the 8th of February, 1832, the Master wrote upon the state of facts: "Allow this state of facts, subject to the title."

On the 21st of July, 1832, the Master reported that the estates and premises which the Petitioners had agreed to purchase were worth £1000, and were fit and proper purchases wherein to invest the said sum, and in August, 1832, this report was confirmed by Lord *Gifford*.

On the 2nd of November, 1832, an indenture, which was

approved of by the Master, was executed to carry out the agreement. This indenture, however, conveyed not only the estates comprised in the agreement, but, by sweeping clauses which it contained, extended to estates and lands of the value of more than £40,000, of which Earl *John* was seised in fee simple and in tail, which were not included in the agreement and the order of reference. The deed conveyed those parts of the lands therein comprised of which Earl *John* was tenant in tail, to *Thomas Rhodes* and his heirs, that he might be tenant to the præcipe in a common recovery, to enure to the uses and subject to the restrictions on alienation of the Act of 1719.

No exemplification could be found of a recovery suffered in pursuance of the conveyance of 1832, and there was no evidence of the recovery having been suffered, except an entry in the Prothonotary's book.

In 1843 a private Act, 6 & 7 Vict. c. 28, was passed, reciting the Act of 1719, and the pedigree of the persons to whom the estates had devolved, and reciting to the effect that it would be for the benefit of the then Earl, and of the persons to succeed to the settled estates, if the dispersed portions mentioned in the 2nd schedule were vested in trustees in trust to sell, with a provision for investing the purchase-moneys, under the direction of the Court of Chancery, in the purchase of other estates to be settled to the uses of the settled estates not vested by the 43 Geo. 3, c. 10, or by this Act, in trustees for sale, and that, in consequence of "the great increase in the annual value of the said settled estates" since the passing of the Act of 6 Geo. 1, it was reasonable that the successive takers of the said estates should have powers of jointuring to a greater extent than the £2000, and that it would be for the benefit of the persons succeeding to the settled estates if they were to have such fresh leasing powers as therein mentioned, and if they were authorized to make exchanges under the direction of the Court of Chancery, and that it was expedient that the proviso permitting Protestants to alienate the estates should be repealed. The Act then vested the estates specified in the 2nd schedule, including about ten acres of the land comprised in the conveyance of 1832, one parcel of which was described as "purchased by the trustees under the Act of 43 Geo. 3," in trustees for sale, with provisions

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for reinvestment in lands under the direction of the Court, and gave a new power of jointuring to the extent of £3000 a year in lieu of the old power, gave fresh powers of leasing, and powers to appoint annuities to younger children, powers of exchange under the direction of the Court, and powers of granting mining and building leases. The proviso enabling Protestant Earls to alienate was repealed. The powers of jointuring conferred by this Act were given over the estates "which for the time being shall stand or be limited and settled by virtue of, or under, the said indenture of the 31st of October, 1700, the will of the said *Charles* Duke of *Shrewsbury*, the said indenture of the 4th of March, 1718, and the said Act of 6 Geo. 1, or any of them, or by virtue of, or under, or by means of, any purchase, exchange, or partition, or any Act or Acts for inclosure, or otherwise howsoever, to such of the uses by the said indenture of the 4th of March, 1718, and the said Act of 6 Geo. 1, respectively limited as aforesaid, as shall then be subsisting or capable of taking effect." The estates over which the several powers of leasing, and the powers of exchange and of charging annuities for younger children, were to extend, were defined in the same way.

In 1852 Earl *John* died, leaving a will, by which he devised all his estates to trustees, giving to the person who should succeed to the Earldom an option of purchasing his unsettled estates.

Earl *Bertram* succeeded, and he being a minor, the option was exercised on his behalf under the direction of the Court, and he thus became owner of Earl *John's* unsettled estates.

Supposing no recovery to have been suffered of those estates comprised in the transaction of 1832, of which Earl *John* was tenant in tail, Earl *Bertram*, upon Earl *John's* death, became tenant in tail of them. He became, upon Earl *John's* death, tenant in tail under the conveyance of 1832 of all estates effectually conveyed by it.

Earl *Bertram*, after attaining his majority, executed two disentailing deeds, disentailing, so far as he could, all estates of which he was tenant in tail, and limiting them to himself in fee. He died in 1856, leaving a will, by which he devised all his estates to Serjeant *Bellasis* and Mr. *Hope Scott* for a term of years, upon certain trusts, and, subject thereto, to the Plaintiffs. Upon his

death the present Earl of *Shrewsbury* took possession of all the estates comprised in the conveyance of 1832.

The Plaintiffs filed their bill, as devisees of Earl *Bertram*, claiming the estates which were settled in 1832, on the ground that the transaction was a fraud on the Act, and that, therefore, the parliamentary restraint on alienation did not attach. A suit instituted by the trustees of Earl *John's* will, claiming the estates as part of the estates of Earl *John* not included in the purchase by Earl *Bertram*, was ended by a compromise, under which all the interest of Earl *John's* trustees was made over to the Plaintiffs. This compromise was brought before the Court by the Plaintiffs by supplemental bill.

The Master of the Rolls having held the transactions of 1832 valid under the Acts, and having dismissed the bill, the Plaintiffs appealed. The appeal was heard before the Lord Chancellor, and the Lords Justices *Turner* and Lord *Cairns*.

Sir *Roundell Palmer*, Q.C., and Mr. *Charles Hall*, for the Appellants:—

If this decision be upheld, it will be in the power of the Earls of *Shrewsbury* to add to the inalienable estates to an unlimited extent. Of course the trustees were at liberty to make as good a bargain as they could, but here there was no bargain at all. The real nature of the transaction must be looked to, and it is gift, not sale; it is a fraud on the Act. Perpetuity is against the policy of the law. This Act, to a certain limited extent, goes against that policy, but this limited exception does not authorize an individual to give his lands so as to subject them to the restrictions which the Acts only affix on purchased lands. It has been urged against us that this would have been a good settlement within the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4. But that is not a fair test; those statutes relate to fraudulent conveyances, here the question is not whether the conveyance was fraudulent against purchasers or creditors, but whether the transaction was a purchase within the Acts relating to these estates. *Townend* v. *Toker* (1) is, for that reason, inapplicable; but if it were more in point the observations on page 459 would be strongly in our favour, for here there

(1) Law Rep. 1 Ch. 446, 12 Jur. N. S. 477

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was a mere attempt to raise a valuable consideration. A more proper test of the efficacy of the settlement in the present case is, was it such a sale as would defeat a prior voluntary settlement? We say it would not. *Sugden's* Vendors and Purchasers (1); *Upton* v. *Basset* (2). The same principle is recognised in *Twyne's Case* (3); *Doe* v. *Routledge* (4); *Metcalfe* v. *Pulvertoft* (5); *Doe* v. *James* (6). The result is, that the conveyance of the estates now in question was a mere voluntary settlement, not coming within the Acts. The recovery, moreover, is bad, there being no proof of the issue of the writ of seisin; *Aubrey* v. *Lord Bridgewater* (7); *Witham* v. *Earl of Derby* (8): and the Act 14 Geo. 2, c. 20, s. 4, does not cure the defect, this not being a purchase for value. Earl *Bertram*, therefore, as to all the estate comprised in the transaction of 1832, became tenant in tail without any effectual restraint on alienation, and his dispositions of them have given the Plaintiffs a good title. The Act 6 & 7 Vict. c. 28, does not alter the case, it was merely directed to doing away with a particular power of alienation over, and giving certain powers over, the lands included in the parliamentary entail, and cannot have the indirect effect of settling what those lands were: *Mackenzie* v. *Stuart* (9); *Biddulph* v. *Biddulph* (10). The estates may be held to pass under the will of Earl *John*: *Incorporated Society* v. *Richards* (11). We submit, therefore, that we are clearly right on the merits. We have a right to come to this Court in a case involving fraud, and requiring the delivery up of instruments: *Lord St. John* v. *Lady St. John* (12); *Crofts* v. *Evetts* (13). We have also an equity for ascertaining boundaries, an equity as to title deeds, timber, and rents and profits. The objection was taken that we are suing in respect of inconsistent titles, as in *Cholmondeley* v. *Clinton* (14), but that objection is untenable, for if two inconsistent titles meet in the same person he is not to lose his rights: *Wing* v. *Angrave* (15), and the later title is properly

13th Feb 1867.

(1) 14th Ed. p. 713.
(2) Cro. Eliz. 445.
(3) 2 Rep. 212, 80 b.
(4) 2 Cowp. 705, 712.
(5) 1 V. & B. 180.
(6) 16 East, 212.
(7) Sir *W. Jones*, p. 10.
(8) 1 Wils. 48.
(9) Cru. Dig. vol. 5, p. 23.
(10) Ibid. 26.
(11) 1 D. & War. 258.
(12) 11 Ves. 535.
(13) Moore, 784.
(14) T. & R. 107, 116.
(15) 8 H. L. C. 183.

brought forward by supplemental bill: *Hollingworth* v. *Shakeshaft* (1). A Court of law would feel great difficulty in overthrowing an instrument which apparently had the sanction of the Court of Chancery, but supposing such sanction given with the facts clearly before the Court, which does not seem to have been the case, it could not bring this transaction within the Act.

Mr. *Bovill*, for the trustees of Earl *John's* will.

Mr. *Badeley*, for Serjeant *Bellasis* and Mr. *Hope Scott*.

The *Attorney-General* (Sir *John Rolt*), Mr. *G. M. Giffard*, Q.C., and Mr. *Wickens*, for the Earl of *Shrewsbury*:—

First, we say that the deed of 1832 was a valid sale at law, and that there is no equity to impeach it. A substantial, not a merely nominal, consideration was given; and it is not the less a purchase because the price was inadequate. The Court cannot look to the motive. Then it is said that the transaction was against the policy of the law, but to shew it to be against the policy of the law it must be shewn to be against law: *Richardson* v. *Mellish* (2); *Hibblewhite* v. *M'Morine* (3). The question turns on the construction of the Act, and the sole object of the Act is the benefit of the settled estates. The Act contains nothing aiming at preventing the trustees from getting as much as they could. The direction for settlement to the same uses refers us back to the Act of 1719, the objects of which were the maintenance of the dignity, the prevention of alienation by Papists, and to induce conversion from Popery. These grounds do not detract from our argument as to the policy of the Act.

[The LORD JUSTICE TURNER:—When the Act speaks of a purchase does it not mean a *bonâ fide* purchase?]

It is in the nature of a purchase that the purchaser should get as much as he can, the vendor, if *sui juris*, may give as much as he pleases. It would have been a breach of trust in the trustees to refuse this good bargain. The same object might have been effected in a variety of ways. For instance, the Earl might have

(1) 14 Beav. 492. (2) 2 Bing. 229. (3) 5 M. & W. 462.

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given £100,000 for five acres of the land sold under the Act, or have laid that sum out on a part of the land before it was sold. As to the cases referred to on the other side, suppose Earl *John* had afterwards sold these estates, could the purchaser have upset this as a voluntary settlement? But suppose he could, that does not conclude the case, for the statutes of *Elizabeth*, being passed for quite a different purpose, their construction cannot govern the construction of this Act. The purchase, then, we contend, was good at law, and there is no equity to impeach it. The consent of the Court of Chancery was required by the Act, that the Court might see that the trustees made a good enough bargain, and got a good title; and by an order, which is not appealed from or impeached, the Court approved of this purchase. But if there be any equity, how can the heirs of those who did the act claim such equity against the persons for whose benefit the act was done. But even if up to this point we are wrong, we say that the Act 6 & 7 Vict. c. 28, operated as a new statutory settlement of the whole estates, and two pieces of the lands conveyed in 1832 are specifically dealt with by it.

Mr. *W. M. James*, Q.C., and Mr. *Kekewich*, for the trustees for sale.

Sir *Roundell Palmer*, in reply:—

The relation of vendor and purchaser never existed in this case. The transaction was a gift, and not a purchase. The argument that, as we represent Earl *Bertram* and Earl *John*, we cannot come here, is extraordinary; the law which does not allow an ancestor to impose a restraint on alienation does not allow him to estop his heirs from disputing his right to do so. It is said that this is a *res judicata*, but there cannot be a binding adjudication on an *ex parte* Petition; and, moreover, it does not appear that the real point was brought to the attention of the Court. If we have a title apart from the last Act, clear words in that Act are necessary to take it away. There is nothing in the language of that Act shewing the faintest trace of an intention to bring within the restraint on alienation lands not already effectually subjected to it; and the language cannot be construed by inference from the cir-

cumstances in which the Act was passed: *Mackenzie* v. *Stuart* (1); *Earl of Shrewsbury* v. *Scott* (2). The case of *Simpson* v. *Lord Howden* (3) supports our right to come to this Court, the instrument being apparently legal on its face. Moreover, the £1000 which was paid must be restored to the fund in Court, and is an equitable charge on the lands now in question, which alone is a sufficient reason for coming here.

July 17. LORD CHELMSFORD, L.C., after stating the facts as to the conveyance of 1832, continued:—

Upon this transaction two questions arise. First: Were all the true facts of the case distinctly and fully brought to the notice of the Court so as to enable it properly to perform the duty of order and direction imposed upon it by the Act of 1803? Secondly: If they were, ought the order confirming the Master's report to have been made?

I think there can be no doubt of the object and intention of the Legislature as expressed in the 3rd section of the 43 Geo. 3. Lands inconveniently situated with respect to the principal estates in the Parliamentary settlement of the 6 Geo. 1, were to be sold by the trustees; and other lands, lying more conveniently and advantageously, were to be purchased with the moneys to arise from the sales, and to be settled to the same uses, and to be subject to the same restrictions upon alienation. It was only such lands as the produce of the sales of the settled lands would enable the trustees to obtain by actual purchase, which appear to have been in the contemplation of the Legislature. It was, of course, intended to leave the trustees to make as good a bargain as possible, which might in some instances bring estates of a little more value within the fetters of the entail than those which were released from it. But it never could have been contemplated that estates far beyond what the moneys produced by sales could possibly have purchased, should by any contrivance be brought within the Parliamentary settlement.

Was, then, the agreement between Earl *Charles* and the trustees

(1) Cru. Dig. vol. 5, p. 23. (2) 6 C. B. (N.S.) 1. (3) 3 My. & Cr. 97.

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a real agreement for purchase, or was it a scheme, under colour of a purchase, to bring large estates within the Parliamentary entail which could not properly be made subject to it?

The counsel for the Respondents say that on the face of the deed it appears to be a purchase, that the amount of consideration is wholly immaterial, that a vendor may be trusted to take care of himself, and if he chooses to give lands to twenty times the value of the purchase-money, there is no law to restrain him, and they add, that the parties having dealt upon the footing of a purchase no further inquiry can be made into the matter. All these observations, except the last, are well founded. But when it is said that the mode of dealing of the parties is to conclude all further question as to its real character, I think it is open to the Plaintiffs to shew that the transaction, though cloaked as a purchase, was of an entirely different description, and that it was only made to assume that appearance to satisfy the letter of the Act of Parliament, while it violated its spirit. That this was the real object of the parties is disclosed in the case laid before Mr. *Shadwell*.

The object of the parties, therefore, being that a real gift should be made to bear the semblance of a sale, was the true nature of the transaction distinctly brought to the notice of the Court, so as to enable a correct judgment to be formed of its validity? It was said by the counsel for the Respondents that Mr. *Shadwell* was not likely to have kept back anything with which the Court ought to have been made acquainted. But his view of the case might fairly have led him to present it in the only aspect in which the parties intended it to appear, viz., as a real sale, though for a sum greatly disproportionate to the value of the lands to be acquired. That this was the light in which the Court was asked to view the transaction appears from Mr. *Tinney's* note upon his brief, which seems to me clearly to shew that the case must have been represented to be that of a real bargain and a real sale between the vendor and the trustees; whereas, if the real facts had been known, it would have appeared that there was no bargaining at all, but that the whole affair was the voluntary act of Earl *Charles*, contrived for the purpose of satisfying the requirements of the Act of 1803, by giving to the transaction the false appearance of a purchase.

The proceeding, from first to last, satisfies me that the real question was never brought before the Court. The Petition for reference to the Master was upon the ground that this was a purchase for much less than the value of the lands, and, consequently, a most advantageous one. The report of the Master adopted the statements contained in the Petition, and the Court confirmed the report, apparently without attention to the fact that an alleged sale at such a great undervalue must necessarily bring under the entail of the 6 Geo. 1, more lands than the Legislature could have contemplated or intended to sanction by the Act of the 43 Geo. 3. I think, therefore, that there was no such order and direction of the Court as was necessary to give validity to the acquisition of the lands contained in the agreement.

But, assuming that the Court was fully informed of the real nature of the agreement, I think that the order confirming the Master's report is not to be justified. As I have already said, I consider it to be quite clear that the Act of 1803 permitted the sale of part of the settled lands, and the acquisition of others, only by a real purchase with the moneys produced by the previous sales. The Legislature never could have intended (and they seem by the language they have used to guard against the possibility of such an intention being attributed to them) to permit each Earl of *Shrewsbury* in possession under the entail, as long as money remained from sales made under the Act, to employ any small portion of it, sufficient to serve as a consideration, to give the character of a purchase to the conveyance of any quantity and value of lands which he might at any time desire to bring within the inalienable entail of the Act of 6 Geo. 1.

Supposing, however, that the contract which received the sanction of the Court, followed by the conveyance, placed the lands which were contained in both the contract and the conveyance within the Parliamentary entail, how can the lands which were included in the conveyance of 1832, without being in the agreement, be brought within that entail? There are two conclusive objections to this being the case: first, as to these particular lands, the transaction could not possibly be a purchase under the 43 Geo. 3, because the £1000 consideration was given only for the lands in the contract, and all beyond these must have

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been a voluntary gift; secondly, the order of the Master of the Rolls did not extend to these lands, and therefore there was no order and direction of the Court respecting them, as the Act requires.

Different considerations are applicable to these last-mentioned lands, as they were fee simple lands of Earl *John*, or belonging to him as tenant in tail. As to the former, it was quite competent to him to create an estate tail, and Earl *Bertram* would be his heir in tail; but Earl *John* could not impose any fetters upon alienation upon such an estate, and Earl *Bertram* might take as heir under the entail and reject the restraint upon alienation. Under these circumstances, his disentailing deed operated to give him the fee which he devised to the Plaintiffs.

As to the lands held by Earl *John* in tail, he could make no alienation by an ordinary deed to defeat Earl *Bertram's* succession. But it is alleged that Earl *John* suffered a recovery of the entailed lands. Nothing, however, is found with respect to this supposed recovery, except an entry in the Prothonotary's book. The Respondents, however, claim the benefit of the 14 Geo. 2, c. 20, by which, where no entry of a recovery appears upon record, purchasers may give in evidence the deed making the tenant to the præcipe, which is to be sufficient evidence that the recovery was suffered. But this Act applies only to purchasers for valuable consideration, and therefore is inapplicable to the present case, in which, according to the opinion I have already expressed, there was no *bonâ fide* purchase, but a mere colourable pretence of one.

The conclusion at which I have arrived is, that both as to the lands held by Earl *John* in fee, and as to those of which he was tenant in tail, Earl *Bertram's* disentailing deed is equally operative.

But the Respondents strongly rely upon a subsequent Act of the 6 & 7 Vict. c. 28, which they say contains a Parliamentary recognition and sanction of the alleged purchase of 1832. The arguments founded upon this statute must proceed upon the assumption that the proviso against alienation in the 6 Geo. 1, did not apply to the settlement of 1832. And then the question to be considered upon the Act is, whether in its general scope and

intent, or from the general words used in it, a manifest intention can be collected to ratify and confirm the settlement. The Act was for vesting part of the settled estates in the counties of *Oxford*, *Chester*, *Salop*, *Worcester*, and *Stafford*, in trustees, to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands and hereditaments, to be settled in lieu thereof "to the same uses and subject to the like restrictions." There is no reference to the 43 Geo. 3, except in a recital as to the lands to be purchased with the produce of the sales, which it is said "are to be settled to the uses and under the restrictions which shall be subsisting or capable of taking effect in the settled estates not vested by the Act of 43 Geo. 3, c. 40, or by this Act, in trustees to be sold." And in one of the schedules to the Act a house and meadow are inserted, and stated to have been "purchased by the trustees under the Act of 43 Geo. 3."

The objects of the Act appear to be to allow other parts of the settled estates to be sold, in addition to those to which the 43 Geo. 3 applied, and also to confer upon the successive Earls of *Shrewsbury* powers of jointuring to an extent beyond that which they possessed.

These being the general objects of the Act, it is contended on the part of the Respondents that it must have been the intention of the Legislature to recognise the settlement of 1832 as a subsisting settlement, which is proved by various indications. The first is, that the reason for giving an increased power of jointuring is stated to be the great increase in the annual value of the settled estates since the passing of the 6 Geo. 1, which, it was said, could only refer to the increase of value arising from the large estates brought within the Parliamentary settlement by the conveyance of 1832. But I should have thought that if the Legislature meant to refer to this addition to the estates, it would not have spoken of the increase in their annual value, but of the large addition which had been made to the settled estates themselves since the Act. In the next place, it is said that the Act of 43 Geo. 3 being referred to, and certain lands being spoken of as part of the settled estates, and especially as three closes, containing eleven acres, part of the lands contained in the conveyance of 1832, are inserted in a schedule, it is clear that the Legislature must have had that con-

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veyance in view, and dealt with it as a subsisting settlement. By one of the recitals in the Act, several manors, messuages, &c., are stated to be set forth and described in the 2nd schedule and are referred to as being part of the settled estates. Now the eleven acres inserted in this schedule were not part of the settled estates, unless the conveyance of 1832 made them so; it is, therefore, insisted that the evident intention was to give validity to this settlement. It seems to me that the whole view of the Legislature was directed to the Act of 6 Geo. 1, and that the introduction of the eleven acres into the schedule, as part of the settled lands, was an error and oversight, and that a mere trivial slip of this kind cannot have the effect of proving an intention entirely opposed to the whole scope and design of the Act.

The Respondents, however, lastly insist, that granting the right claimed by the devisees of Earl *Bertram*, their remedy is to be sought in a Court of law, and that there are no equitable grounds for coming into a Court of equity. But it appears to me that there are circumstances in this case which make it proper to resort to a Court of equity for relief. There can be no doubt that the parties intended to evade the Act of 1803 by concealing the real character of the transaction which led to the conveyance of 1832. Upon the face of the deed all seems fair and in accordance with the Act, but the true nature of the alleged purchase can be reached only by extrinsic evidence. It may be doubtful whether at law this could be got at. But, in addition to this, the order of the Court of Chancery would be likely seriously to embarrass the Courts of law in questioning a purchase which had apparently received the sanction of the Court under whose order and direction it must have taken place. And, as Lord *Shrewsbury* truly says in his answer, the devisees of Earl *Bertram* can only recover upon the terms of their restoring to the trust fund the amount raised out of such trust fund for the purpose of the purchase, which, of course, renders it necessary for the Plaintiffs to resort to a Court of equity.

Upon the whole case I am of opinion that the decree of the Master of the Rolls must be reversed, and the supplemental bill, as against Lord *Shrewsbury* and *Talbot*, and Lord *Dynevor*, must be dismissed, with costs.

His Lordship then read minutes of order, of which the following is an abstract:—

Reverse the decree at the Rolls.

Dismiss the supplemental bill as against Lord *Shrewsbury* and Lord *Dynevor*, with costs.

Declare the £1000 not well or effectually invested in the purchase of real estate within the meaning of the Act, and that the estates comprised in the indenture of the 2nd of November, 1832, were not thereby made subject to the restriction on alienation contained in the Act of 6 Geo. 1, c. 29.

Declare that the £1000 constitutes a charge on the lands comprised in the indenture of the 2nd of November, 1832, other than the eleven acres. This to be without prejudice to any right which the Plaintiffs may have in respect of the eleven acres.

Order the Plaintiffs, within one month, to pay into Court the £1000, with interest at £4 per cent. from the death of Earl *Bertram*; in default the bill to be dismissed.

The £1000 and interest to be placed to the account "Purchase-Money of Estates of Earl of *Shrewsbury*," with liberty to apply.

Declare that on such payment being made, Plaintiffs are entitled to hold the lands, other than the eleven acres, freed from any lien or claim in respect of the £1000.

Take account of rents and profits received by Defendant, the Earl of *Shrewsbury*.

Plaintiffs to pay the costs at the Rolls of Defendants *Salt* and Lord *Dynevor*.

No other costs at the Rolls, or in the Court of Appeal.

LORD CAIRNS, L.J.:—

By the Act of 1719 certain specified parts of the estates of the late Duke of *Shrewsbury* were annexed to the Earldom of *Shrewsbury*, and were made inalienable except in the hands of any holder of the title who might, within six months after attaining eighteen, profess himself to be, and thenceforward continue, a Protestant. This Act contains certain powers of raising portions, jointuring, and leasing, but it contains no powers of sale and exchange of the settled property.

After the lapse of nearly 100 years, viz. in the year 1803, the second Act of Parliament, upon which the principal argument in this case took place, was passed. The effect of this Act was, in my opinion, to insert in the Parliamentary settlement of the estates a qualified and guarded power of sale and exchange as to a limited portion of them. In the exercise of this power an order or direction of the Court of Chancery was to be invoked, not by way of judicial determination of any matter in litigation, but in order to obtain

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for persons entitled under the settlement who might not be in existence, or *sui juris*, a security that the lands purchased were of adequate value, of proper title and tenure, and situated in the counties intended. No question of policy could, on the occasion of conferring this power of sale and exchange, arise as to bringing a greater amount of land into an inalienable settlement, for no fresh land could enter this settlement except through the medium of a purchase, and as a fair equivalent for land already subject to it; and so long as the substitution of new estates for old should be made through the medium of a *bonâ fide* sale and purchase between a real vendor and a real purchaser, both anxious and intending to enter into a real bargain, no better or safer guarantee could exist that the fetter against alienation introduced in 1719 would, by the Act of 1803, be modified in form only, without being extended in principle, or in the limit of its operation.

The principal, if not the only real question in the case, is, whether what was done between the year 1824 and the year 1832, apparently under colour and authority of this Act, was in truth a real and *bonâ fide* exercise of this power of sale and exchange? In my opinion it was not. It may, I think, be doubted whether, having regard to the form of the original Petition to the Court, and of the order of reference to the Master, especially the liberty to state special circumstances—of the state of facts before the Master—of the report and subsequent order—and of the indenture of the 2nd of November, 1832, and having regard also to who the parties were before the Court, the Court had fully present to its mind the real facts of this case as we now know them, and the true character of the duty it was called upon to perform. And this doubt I feel notwithstanding the indorsements on the briefs of Mr. *Shadwell* and Mr. *Tinney*, used on the hearing of the original Petition. But I think it safer to assume that the Defendant is entitled to all the benefit that could be derived from those proceedings before the Court, supposing the Court had advisedly, and on full consideration of all the circumstances of the case, made the order which it did make.

What, then, are the facts of the case which are beyond controversy? The indenture of the 2nd of November, 1832, professes *ex facie* to be a purchase deed, and to be a conveyance for value in

the ordinary way. In point of fact, the property given in return for the £1000 paid out of Court was of the value of between £130,000 and £140,000, and out of this, land of about the value of £40,000 was not comprised in the original contract between *Charles* Earl of *Shrewsbury* and the trustees of the Act, but was added by Earl *John* in the course of the proceedings before the Master.

These figures would of themselves be almost sufficient to explain the true nature of the transaction, but all doubt is removed by the case submitted on behalf of the Earl of *Shrewsbury* and the trustees for the opinion of counsel before the proceedings in Court were taken. All that was afterwards done was strictly in accordance with the intention indicated by the statements of that case. The transaction was not, in my opinion, in any way a *bonâ fide* transaction of sale and purchase. It was in reality a voluntary settlement, in which the forms of the Court of Chancery, and the payment out of Court of £1000, were resorted to in order to give the transaction the appearance of a purchase, and in order to give, if possible, to the voluntary settlement the statutory character of inalienability. As a voluntary settlement the transaction is one which might or might not be impeached by the parties to it, but as a purchase under the Act of Parliament, and as a settlement which is to bear the fetter against alienation, the transaction, in my opinion, cannot be maintained.

It was contended, however, on the part of the Defendant, that even if this were so the remedy of the Plaintiff is in a Court of law, and that there was no equity to support the bill.

It may well be that a Court of law, if it adopted the view of the Acts of Parliament and of what has been done under them which I have endeavoured to express, would, on an ejectment, put the Plaintiff into possession, but it is to be observed that this would not, by any means, settle the rights of the parties. A sum of £1000 trust money, impressed with certain trusts for its due investment in land, according to the true meaning of the Act of 1803, has been paid out of the Court of Chancery on the occasion of the settlement by the deed of the 2nd of November, 1832, of the estates in question in this suit. In the view which I take of the case, this sum has been improperly diverted from the trusts to

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which it was subject, and forms a lien upon the property paramount to the interest, otherwise absolute, which *Bertram* Earl of *Shrewsbury* acquired by barring the entail. This sum must be brought back into the Court of Chancery, and the suit is in this respect in the nature of a bill by an owner having a legal title, but desiring and offering to clear his estate of an equitable incumbrance. In addition to this, the deed of 1832 is a deed which does not, on the face of it, express the true nature of the transaction, and professes to be made under colour of orders of the Court which might readily form an impediment to proceedings at law. And upon this ground, also, the case is one in which, in my opinion, the Court of Chancery has jurisdiction.

It remains to be considered how far, if at all, the conclusions at which I have arrived are affected by the Act of 1843. In considering that Act, the condition of the argument assumes that at the time it was passed the property included in the deed of 1832 had become the subject of a settlement, valid so far as to make Earl *John* tenant in tail, but invalid as regards any restraint on alienation. And the question is, whether this Act operated so as to give the estates an inalienable character which otherwise they did not possess? I can find nothing in the Act having this effect, Even without calling in aid the rules which have given to private Acts of Parliament an effect more limited than the strict construction of the words might sometimes have seemed to require, I can find nothing in the Act more than an intention to deal with the settled *Shrewsbury* estates as they stood at that time, without considering as to which of the estates, or whether as to all, the restriction on alienation had been validly imposed, and still less do I find any words which impose upon any of the estates a restraint on alienation to which they were not otherwise subject. The Act repeals the proviso in the statute of 1719, removing from Protestants the incapacity to alien, but with this alteration it leaves the fetter against alienation as it stood before the Act of 1843 passed. It repeats, as to certain other detached portions of land, a power of sale and exchange similar to that in the Act of 1803, and it confers fresh powers of jointuring, portioning, and granting leases, and it may fairly be said that, in soliciting these powers, the parties thought that the transaction ending in the deed of 1832

was in all respects a valid transaction. But this would fall far short of giving statutory validity to that transaction in those respects in which its validity was open to question.

From the operation of what I have said I must except three closes of land, about eleven acres in all, in the county of *Worcester*, mentioned in the 2nd schedule of the Act of 1843. It is agreed that these were included in the deed of 1832, and by the Act of 1843 they are vested in the trustees of the Act in fee simple, in trust for sale. The 5th section provides that until the sale the rents shall be received for the benefit of the person who ought to have enjoyed the same in case the premises had not by that Act been vested in trustees for sale. Under the provision, and under the prayer of the bill, the most that the Plaintiff can, as to this land, be entitled to is an account and payment of the rents.

In my opinion, the decree at the Rolls must be reversed, and a decree made to the effect that has been stated by the Lord Chancellor. As the litigation has arisen in consequence of the acts of those under whom the Plaintiffs claim, I think there should be no costs given to them, either of the Court below, or of the appeal. The Plaintiffs must, however, recover, and are, I think, entitled to recover, on the strength of their title in the original bill, namely, under *Bertram*, Earl of *Shrewsbury*, who being tenant in tail of of the property in question duly barred the entail, and the Defendants Lord *Shrewsbury* and Lord *Dynevor*, having, in this view of the case, no connexion with the matter of the supplemental bill, it must, as to these Defendants, be dismissed with costs.

Solicitor for the Plaintiffs: Mr. *W. Williams* (late *Currie & Williams*).

Solicitors for the Defendants: Messrs. *Nicholson & Herbert;* Messrs. *Bray, Warren, Harding & Warren;* Messrs. *Young & Jackson.*

L. JJ.
1867
April 24;
May 2, 4, 13.

LORD *v.* LORD.

Will—Appointment—Legacy—Interest—Trust for Payment of Legacy in futuro.

A testatrix, having a general power of appointment over property which was the subject of pending litigation, appointed it by her will to *J. L.*, upon trust, "so soon as proceedings in law and equity should be terminated, and the same should come into his possession," to pay certain legacies, and as to the residue upon other trusts:—

Held, that the trust to pay the legacies did not arise, and consequently that the legacies did not carry interest until the litigation ended and the property came into the hands of *J. L.*, which was not until more than eighteen years after the death of the testatrix.

Wood v. *Penoyre* (1) distinguished.

THIS was a motion by way of appeal from a decision of the Master of the Rolls, as to the period from which interest was due on a legacy of £2000 given by the will of *Eleanor Lord* to *Joseph Fuller*.

E. Lord, who died on the 30th of December, 1844, by her will, made in pursuance of a general power of appointment, given to her by the settlement made upon her marriage with the Defendant, *James Lord*, in 1842, appointed the property comprised in the second schedule to the settlement to *James Lord*, "upon trust that so soon as proceedings in law and equity shall be terminated, and the same shall come into his possession, that then he shall pay, assign, and transfer" [here followed a specification of various sums of stock]; "secondly, to pay to each of my brothers and my sister £2000;" then to pay other legacies and annuities, and, "subject to the above regulations, legacies, annuities, bequests, and payments," as to a third of the residue for his own use, and as to two-thirds in trust for himself for life, with remainder upon other trusts.

The property comprised in the second schedule to the settlement consisted of the estate of Dr. *Cochrane*, deceased, the father of *Peter Cochrane*, the former husband of *E. Lord*, to which *Peter Cochrane* was, at his death, either in his own right, or as next of kin of his mother, *Margaret Cochrane*, or of his brother, *John*

(1) 13 Ves. 325.

Cochrane, entitled in possession, reversion, or contingency, or so much thereof as *E. Lord*, as his widow, became entitled to on his death.

Dr. *Cochrane*, who died on the 18th of June, 1831, by his will gave his residuary personal estate to his sons, *John* and *Peter* (who were his only legitimate children), to be paid to them on attaining the age of twenty-five years; and in case they should both die under that age, without issue, he gave it to the children of his natural daughter, *Susan Moorhouse*. His wife, *Margaret*, his two sons, and *S. Moorhouse* survived him. *Margaret* died in 1834, intestate; *John* died in April, 1835, a bachelor, under twenty-five, and intestate; *Peter* died in July, 1835, under twenty-five, and intestate, leaving a widow, afterwards *E. Lord*, but no child.

A suit for the administration of Dr. *Cochrane's* estate was instituted in 1833; and at the dates of the settlement, and of *E. Lord's* will and death, that estate consisted of about £150,000 consols in Court in the suit, the dividends on which were being accumulated under an order of the Court. *S. Moorhouse* was then living, but had not had a child.

Upon the death of *E. Lord*, *James Lord* took out administration, with the will annexed, to her estate, and also took out administration to the estates of *Margaret*, *John*, and *Peter Cochrane*. Soon afterwards, a supplemental suit of *Lord* v. *Colvin*, and other suits, were instituted, relating to Dr. *Cochrane's* estate, in which questions were raised as to his domicil, and as to his next of kin, and the rights of his widow and children under Scotch law, and as to the legitimacy of *Susan Moorhouse*. In June, 1860, Vice-Chancellor *Kindersley*, by his decree in *Lord* v. *Colvin* (1), and other causes, declared that *Susan Moorhouse* was illegitimate; that Dr. *Cochrane*, at the dates of his will and death, was domiciled in *Scotland*, and that his widow and two sons were his sole next of kin; but refused to declare who would be entitled to the residuary estate in the event of *S. Moorhouse* not having a child, and ordered a case to be sent to the Scotch Court, as to the right to the income which had accrued since the expiration of twenty-one years from Dr. *Cochrane's* death. In January, 1861, the Scotch Court gave its opinion that the income belonged to the

(1) 4 Drew. 366; 5 Jur. N. S. 351

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persons who would have succeeded *ab intestato* to Dr. *Cochrane's* personal estate at his death; and in April, 1861, the Vice-Chancellor ordered the accumulations of income since the 18th of June, 1852, and the future dividends of the capital fund, to be carried to the account of *James Lord* as administrator of *Margaret, John,* and *Peter Cochrane.* Under an order made in March, 1862, £20,000 out of the accumulations was paid to *James Lord,* upon his giving security to refund in the event of the decree of June, 1860, being reversed on appeal.

S. Moorhouse appealed to the House of Lords from the decree of June, 1860, and the appeal was dismissed on the 19th of March, 1863 (1).

In September, 1864, *S. Moorhouse* died, without having had a child. In March, 1865, a case was ordered to be sent to the Scotch Court, to ascertain who was then entitled to the capital of Dr. *Cochrane's* estate; and in July, 1865, the Scotch Court gave its opinion that *James Lord* was entitled thereto, as administrator of *Margaret, John,* and *Peter Cochrane.* An order had been made by Vice-Chancellor *Kindersley,* giving effect to that opinion; but, in consequence of questions as to probate and succession duty, *James Lord* had not yet received the capital fund.

The present suit was instituted in 1863, and the conduct of the cause had been given to *Richard Hooper,* the assignee of the legacy of £2000 given to one of *E. Lord's* brothers, *Joseph Fuller.* The Master of the Rolls, on an adjourned summons, decided that this legacy carried interest only from the 19th of March, 1863 (2).

Richard Hooper appealed.

(1) *Moorhouse* v. *Lord* (10 H. L. C. 272). *G. Jur. NS. 677.*

(2) The judgment of the Master of the Rolls was as follows:—

I fully admit this principle, that if a testator gives a legacy to *A.*, and directs it to be paid at a future period, the legacy must be paid, with interest at 4 per cent. from one year after the death of the testator. I take that to be the rule of the Court, whether the assets are got in or not; I admit, also, that if the testatrix in this case had said, "I give £2000 to my brother," and had then directed that this should be paid to him when the litigation was over, and when the money was received, he would have been entitled to receive that £2000, with interest at 4 per cent. from one year after the death of the testatrix. That I take to be the rule; but it is quite a different thing where the payment of the money is a part of certain trusts which are to arise at a future period. Take, for instance, the case of *Wood* v. *Penoyre* (13 Ves. 325), which

The *Attorney-General* (Sir *John Rolt*), Mr. *Baggallay*, Q.C., and Mr. *W. Morris*, for the Appellant:—

On the construction of this will the legacies are payable immediately, though out of a fund not capable of immediate realization.

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has been so much relied upon: there the testator gave a legacy of £900, to be paid out of the Irish mortgage when it was got in; there the interest ran from one year after the death of the testator, and the legatee was to be paid when the mortgage was got in. But if the will had run in this form, "I direct, when the Irish mortgage is got in, the produce of that mortgage shall be held by my executors upon trust to pay £900 to *A. B.*, and the residue to *C. D.*," would anybody say that *A. B.* was entitled to that legacy with interest at 4 per cent. from one year after the death of the testator?

The clear construction of the will of this testatrix appears to me to be, that no trust is directed to arise until after the litigation is over and the property is got in, and that thereupon the property is to be held upon the trusts which she mentions. If she had intended that interest should run previously, I think she would have said so, instead of making a declaration of trusts of certain property, which trusts are to arise upon the happening of a particular event. Does it matter whether that event is the termination of the litigation, or any other event? The case is quite free from any technical rule of this Court, that the assets shall be assumed to be realized or got in at a particular period. If the will had said, "when the assets are got in," then the technical rule of one year after the death of the testator might have applied; but there is certainly no technical rule, and certainly there is no rule to be derived from experience, as to the time when a litigation is likely to be at an end in the Court of Chancery, or in any other Court. I am of opinion, therefore, that the trust only arose at that period, and that the Court is to ascertain when that happened. The £2000 was payable then, and interest must run from that period.

Whether the power which the testatrix exercised by her will was a power which enabled her to appoint a certain amount of stock and nothing more, and did not extend to appointing the accumulations, is a question which I think it unnecessary to go into; if her power only extended to appointing so much stock, that is what she has done, but she has appointed it at a particular time, and she has not appointed the interest which accrued due upon it before that period; on the contrary, the object of her will seems to be very much this: that she thought that the interest of the property would be required to pay the costs of the litigation, and that she did not intend to dispose of the fund at all until the litigation was over. The real question, therefore, is, when the litigation was over. The argument with respect to the accumulation of interest which accrued after the lapse of twenty-one years from Dr. *Cochrane's* death, that as such accumulation was void under the *Thellusson Act* no question or litigation could have arisen respecting it, and that therefore there was a fund applicable for the payment of the legacy, appears to me to be wholly untenable. The meaning of the testatrix was, not to select a particular fund and say, "When this particular

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Interest, therefore, runs from a year after the death of the testatrix: *Wood* v. *Penoyre* (1). The case is one where payment was postponed only for the convenience of the estate: *Leeming* v. *Sherratt* (2). The litigation must be taken to have been at an end in 1852. The gift, too, is a trust of part of an interest-bearing fund, and must carry interest.

Sir *Roundell Palmer*, Q.C., Mr. *E. F. Smith*, Q.C., and Mr. *Davey*, for the Respondent:—

On the construction of the will this was a gift of a certain sum out of a fund when realized—a gift *in futuro*, not a present legacy. The interest on a legacy payable *in futuro* only runs from the time when it is payable: *Crickett* v. *Dolby* (3); *Leake* v. *Robinson* (4); *Elwin* v. *Elwin* (5); *Donovan* v. *Needham* (6). In *Wood* v. *Penoyre* there were present words of gift; and all that was decided was, that the direction for payment out of a fund when received, which the

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fund shall not be subject to the litigation," but she meant to say, "When the litigation is *bonâ fide* at an end between the parties." I remember having to look into that question carefully on a former occasion (34 Beav. 220), with respect to the time when the litigation did actually cease, and, if I recollect rightly, Mrs. *Moorhouse* claimed to be the sole legitimate child of Dr. *Cochrane*, so that if she had succeeded she would have taken the whole or the greater part of the property. That was decided against her, and she then appealed upon that point to the House of Lords. I have referred to the observations which I made in *Luff* v. *Lord* (34 Beav. 220), in order to shew that, according to my opinion, the real litigation was not over until March, 1863, when the determination of that question took place. At that time I am of opinion that the litigation was over; I do not consider any proceedings as to getting money out of Court and the like to be a continuance of the litigation. Upon looking at the order of March, 1862, under which £20,000 was paid to Mr. *Lord* out of the accumulations of income, and was paid to him upon an undertaking on his part to deal with the money as the Court should direct, I am of opinion that the money was not paid to him *quâ* tenant for life, and that it was properly applicable to the payment of legacies, and became so as soon as the litigation terminated, which was in March, 1863.

Therefore I am prepared to express my opinion that this legatee is entitled to a legacy of £2000, with interest at 4 per cent. from the 19th of March, 1863. As the question has arisen out of the words of the will, the costs must come out of the testatrix's estate.

(1) 13 Ves. 325.
(2) 2 Hare, 14-17.
(3) 3 Ves. 10.
(4) 2 Mer. 384.
(5) 8 Ves. 547.
(6) 9 Beav. 164.

testator contemplated as not likely to be immediately recovered, did not take away the right to interest. When the fund is reversionary the case is different: *Earle* v. *Bellingham* (1). Here the fund was contingent as well as reversionary, which makes our case all the stronger. There ought not to be interest till after the death of Mrs. *Moorhouse*, for the estate was not till then receivable or vested.

The *Attorney-General*, in reply.

May 12. SIR G. J. TURNER, L.J.:—

The first question is, when, according to the true construction of this will, the legacies in question were payable? The Appellants first contend that they became payable at the end of a year after the death of the testatrix, and in support of that contention they rely, first, upon the words of the will:—[His Lordship read the clause.] The Appellants say that the words "so soon, &c.," apply only to the first direction; that the words "to pay," refer back to the words "upon trust," so that there is an unqualified trust for immediate payment of the legacies.

I am not satisfied that this argument could be maintained upon the most strict construction of the words of this will. It depends upon the effect to be given to the word "that," following immediately upon the words "upon trust." If the words had been "upon trust, so soon as proceedings in law and equity shall be terminated, and the same shall come into his possession, that then he shall pay these sums of stock; and, secondly, to pay to each of my brothers and sister the sum of £2000;" there could not, I think, have been any reasonable doubt that the words "so soon as proceedings in law and equity shall be terminated," overrode the whole of the subsequent disposition. The word "that," which creates the difficulty, may, I think, well be considered as a word of surplusage, the same word being subsequently found in the direction to transfer. But however the case might stand upon the strict literal construction, there can, I think, be no reasonable

(1) 24 Beav. 448; 3 Jur. N.S. 1237.

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doubt of the intention. The testatrix refers to property with which she is dealing, as being the subject of litigation, and as property to come into possession. Is it possible to suppose that she could intend her executor to pay the legacies before the litigation was ended, and before the property came into his possession? Besides this she has distinguished, by her will, between the property which she could immediately dispose of, and that which she could not, and, moreover, these legacies are part of a series of dispositions, the last of which, the residuary disposition, seems to me to have been evidently intended to be subject to the termination of the litigation and the possession of the property.

It was attempted to support the Appellant's argument on this part of the case by reference to the case of *Wood* v. *Penoyre* (1), but that case goes no further than this, that the words "when received," and words of merely similar import, are not sufficient to indicate the intention to alter the general rule of the Court that legacies are to paid at the end of the year. In this case the words are much more pointed; besides which, there is this great distinction between *Wood* v. *Penoyre* and this case—that at the time when this will was made there was no certainty that the property referred to would ever come into possession, as will appear by reference to the will of Dr. *Cochrane;* but in *Wood* v. *Penoyre* there was no such doubt. Another argument in support of the Appellant's view on this part of the case was, that where there is an interest-bearing fund, the time of vesting and the payment of interest go together. But however this may be, and I give no opinion upon it, no such rule can apply here, looking to the dispositions of Dr. *Cochrane's* will. It is strongly against the Appellant's contention on this point, that as late as 1862 the Court refused to pay out the accumulated income to Mr. *Lord* without security being given to refund.

The only question then remaining is, whether the interest, though not running from the end of the year after the death, ought to have been calculated from any earlier period than that fixed by the Master of the Rolls. I am quite satisfied that until this latter date the proceedings in law and equity cannot be said to have been terminated, and much less can it be said that

(1) 13 Ves. 325.

the property came into the possession of the trustee. I am of opinion, therefore, that this appeal must be dismissed, and dismissed with costs.

LORD CAIRNS, L.J. :—

The question on this appeal is purely one of construction of the words used by the testatrix, Mrs. *Lord*, in her will. The rule of law is clear, and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval.

[His Lordship then entered into an elaborate examination of the will, and observed as follows upon the argument that there was an immediate trust for payment of the legacies :—]

The Attorney-General strongly contended that the words "to pay" were to be referred back to the initiatory words "upon trust;" and that thus the words "so soon as, &c.," being connected with the first disposition were rendered inapplicable to the second. I agree that the words "to pay" must be connected with the words "in trust;" but I do not agree with the consequence which the Attorney-General deduced from that observation. It appears to me that where there is a trust dealing with a series of differently numbered members, and where, with regard to the first member of the series, there is a direction that it is not to come into operation until the funds to which all the dispositions relate are in hand, and received out of the litigation, the same direction must be considered applicable to all the members of the series, whether it is in terms made so applicable or not; for it would be absurd to suppose that the testatrix, speaking of the division of a trust fund, should mean, with regard to the first portion which is to be taken out of it, that nothing should be done till a certain event should happen; but that acts should be done immediately as to the other portions, without reference to the event which was to precede the dealing with the first portion. I agree with the Master of the Rolls that there is not any general direction to pay these legacies,

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but only a direction, by way of trust, to distribute a fund upon the happening of a particular event, which might not happen for some time after the death of the testatrix.

[His Lordship then shortly stated his reasons for agreeing with the Master of the Rolls as to the time when the litigation was to be considered to have ended.]

The appeal was dismissed with costs.

Solicitors for the Appellant: Messrs. *Chauntler & Crouch.*
Solicitors for the Respondent: Messrs. *Willoughby & Cox.*

L. JJ. 1867 *Jan.* 22, 23, 28; *May* 28, 30; *June* 2, 4; *July* 29, 31.

BAXENDALE *v.* McMURRAY.

Nuisance—Prescriptive Right—Change of Nuisance.

The Defendant, the owner of an ancient paper mill where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material. For more than twenty years before this change the refuse arising from the paper manufacture had been discharged into a stream which ran past the Plaintiff's house :—

Held, that the easement to which the Defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the onus lay on the Plaintiff to prove any increase of pollution.

Decrees made on motion for decree may, under 30 & 31 Vict. c. 64, be reheard by a single Lord Justice.

THIS was an appeal by the Defendant from a decree of Vice-Chancellor *Stuart*, made on motion for decree, restraining him from pollution of the river *Chess*. The appeal was heard at great length before the Lords Justices *Turner* and Lord *Cairns*, but judgment was not delivered during the life of the Lord Justice *Turner*.

The Plaintiff was a riparian owner on the river *Chess*, being lessee for a term of twenty-one years, from Christmas, 1856, of the dwelling-house and ornamental grounds called *Scotsbridge House*. Above him, on the river, were two paper mills of the Defendant,

one called *Loudwater*, distant about a mile, and the other *Scotsbridge*, about 200 yards from the Plaintiff's premises. These mills were ancient paper mills, and had belonged in succession to one *Weedon*, to one *Ingram*, and to the Defendant.

During all, or some parts of the years 1858, 1859 and 1860, there was a cessation of the working of the mills, but it was not suggested that any easement to which the mills were previously entitled had been lost. With the exception of this interval they appeared to have been worked for the purpose of converting rags into paper, and to have discharged into the *Chess* water polluted by this operation for a period of much more than twenty years prior to October, 1861.

In October, 1861, the Defendant commenced working the mills, and it appeared that for seven or eight months he used rags alone in the manufacture of paper, but soon afterwards he commenced using the Spanish grass called esparto, as a raw material, either alone or along with rags; the esparto being washed, macerated, boiled, and made into the material called "half stuff," which is subsequently converted into paper.

The result of the evidence in the view of the Court was, that the mills in use when the bill was filed were the same in number and extent as in the time of *Webster* and *Ingram*—that the whole quantity of raw material used was not greater than formerly—that the operation upon the same material of the chemical agent latterly used, viz., caustic soda, was not shewn to be substantially different from that of the alkali and lime formerly used, though it was alleged that the effect of the chemical agent on esparto was different from its effect on rags.

The Plaintiff alleged that a great increase of the pollution in the river had arisen from the change in the manufacture, and in November, 1865, filed his bill for an injunction. Vice-Chancellor *Stuart* made a decree, the effect of which was to prohibit the Defendant from polluting the stream to a greater extent than it had been polluted by the former proprietors of the mills.

Mr. *Bacon*, Q.C., Sir *Roundell Palmer*, Q.C., and Mr. *Fry*, for the Appellant:—

A prescriptive right to pollute to some extent is not disputed,

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and the question is, whether the Defendant has exceeded that right. The burden of proof lies on the Plaintiff; he has come into the neighbourhood of mills having a right to discharge refuse into the stream. We say the manufacture might be increased, for an easement depends on an implied grant, and the grant to be presumed would be the right of discharging refuse into the stream, not merely of discharging a fixed quantity. At all events, it would be necessary for the Plaintiff to prove such an increase as would produce a materially different amount of injury: *Attorney-General* v. *Nichol* (1). The evidence fails to shew any change of process or any increase in the amount of materials used. Nor does it shew that the materials now used are such as would produce a greater amount of nuisance than those formerly used, or that the actual amount of nuisance is greater.

Mr. *Dickinson*, Q.C., and Mr. *Birley*, for the Plaintiff:—

The Plaintiff is entitled to have the water flow past him in as good a condition as before the Defendant's operations. The onus might, in an ordinary case, be on the Plaintiff to prove increase of nuisance, but not so here, the Defendant having used new materials. The right to be presumed in the Defendant is the right to pollute to a given extent by the use of a given material, that is, his easement—for the pollution depends on the material used, not on the mere fact of the manufacture of paper, and if he attempts to vary the easement, he must, at all events, prove that he is not imposing a greater burden on the servient tenement. But we say that there cannot be any prescriptive right to introduce into the stream a new substance never thrown into it before the Defendant came. The evidence clearly shews that there is a serious increase of nuisance. The Defendant can easily abate the nuisance, and this is an additional reason for compelling him to do so: *Imperial Gas-light Company* v. *Broadbent* (2).

Mr. *Bacon*, in reply:—

No change of materials can destroy the right of the Defendant to discharge the refuse of his paper mills into the stream; and

(1) 16 Ves. 338. (2) 7 H. L. C. 600, 615.

unless the pollution is so increased or altered as to do injury to the Plaintiff he has no ground of complaint. The Defendant has a right to manufacture paper by the help of the river, and the Plaintiff has no right to examine into the mode of manufacture. *Luttrell's Case* (1), *Bishop* v. *North* (2), *Dand* v. *Kingscote* (3), and *Moore* v. *Webb* (4), shew that a novel user is lawful, provided there be no excess. *Case* v. *Midland Railway Company* (5) supports the same view.

Mr. *Dickinson*, on the cases cited in reply:—

This case would be governed by *Luttrell's Case* if the Defendant were polluting with rags to the same extent as before, for some other purpose than the manufacture of paper, but that case has no bearing on the question, whether for the purpose of manufacturing paper he may pollute with a new material: *Dand* v. *Kingscote* turned on the construction of a deed: *Bishop* v. *North* on the construction of an Act of Parliament, and *Moore* v. *Webb* related only to amount of pollution, not to change of its nature.

July 29. The appeal was this day placed in the paper to be disposed of by the Lord Justice Lord *Cairns* sitting alone; but, a question having been raised whether, under the statute 30 & 31 Vict. c. 64, an appeal from a decree made on motion could be heard by a single Lord Justice, it was arranged that the case should be opened again *pro formâ* on the 31st before the Lords Justices Lord *Cairns* and *Rolt*, that the order made might be treated as the order of both.

July 31. Their Lordships both stated it to be their clear opinion that the words "decree made on the hearing of a cause," in statute 30 & 31 Vict. c. 64, s. 1, did not include a decree made on motion for decree. Their Lordships, however, said, that

(1) 2 Rep. 493, Part iv. 86a.
(2) 11 M. & W. 418.
(3) 6 M. & W. 174, 196.
(4) 1 C. B. (N. S.) 673.
(5) 27 Beav. 247; 5 Jur. N. S. 1017

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as the above arrangement had been made, though before the point had been fully considered, it would not be departed from.

The case then having been reopened *pro formâ*,—

LORD CAIRNS, L.J.:—

It may be satisfactory to the parties for me to say, that this case was fully considered by the late Lord Justice as well as myself; and that, although I alone am responsible for the language of my judgment, he fully concurred in the reasons I am about to give for the conclusion at which we arrived.

[His Lordship then, after stating the facts in nearly the same terms as above, continued:—]

Does, then, the use of a new raw material in the manufacture of paper, from the mere circumstance that the material is new, and different from that formerly used, destroy the right previously possessed by the Defendant to discharge polluted water into the stream? I doubt whether the question on this part of the case is one so much of law as of fact. The question appears to me to be, what is the right or easement of the Defendant? Is it a right, specific and defined, to pollute the stream by discharging the dirty water in which rags have been washed? or is it a right to discharge into the river the refuse liquor and foul washings produced by the manufacture at his mills of paper in the reasonable and proper course of such manufacture, using the materials which are proper for the purpose, but not increasing, as against the servient tenement, to any substantial or tangible degree the amount of pollution? In my opinion the right of the Defendant would, upon the facts before us, be found, and be properly found, by a jury to be the latter, and not the former right. It is difficult to suppose the existence of an easement founded on, and limited to, the washing of rags. If made specific in this way it would be confined to rags known and in use at the time the easement was acquired; and the rags of textile fabrics afterwards coming into use must, however valuable for the manufacture of paper, be excluded. Rags, again, would afford no standard by which to test or limit the amount of pollution. Some would be much more dirty than others; the washings from some might be harmless, and from others deleterious. In rags produced from vegetable substances the pro-

perties of the fibrous matter might be very different; in some, as in linen and cotton rags, the fibre being elaborately treated in the course of manufacture; in others, as in coarse sacking or bagging, especially of hemp or jute, the fibre retaining much more of its original character. I am, therefore, of opinion that it is not sufficient for the Plaintiff to shew that the Defendant uses in the manufacture of paper a raw material different from that formerly employed. He must shew, further, a greater amount of pollution and injury arising from the use of this new material; and the onus, of course, of shewing this lies on the Plaintiff.

[His Lordship then entered into an elaborate examination of the evidence as to the amount of nuisance, and stated his conclusion to be, that the Plaintiff had not discharged the onus which lay upon him of shewing a greater amount of pollution and injury than during the former working of the mills. His Lordship accordingly reversed the decree of the Vice-Chancellor, and dismissed the bill with costs.]

Solicitors for Plaintiff: Messrs. *Uptons, Johnson, & Upton.*
Solicitors for Defendant: Messrs. *Bevan & Whitting.*

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In re THOMPSON.

Bankruptcy—Trust Deed—Unliquidated Damages—Bankruptcy Act, 1861, *ss.* 153, 192, 197.

A person who has a claim against a debtor for unliquidated damages is not a creditor within the meaning of sects. 192 and 197 of the *Bankruptcy Act*, 1861.

Where a trust deed under the 192nd section does not in terms extend to creditors in respect of unliquidated damages, they cannot come in under the deed by virtue of the 153rd section. *Secus* as to a deed in the form of Schedule *D.* under the 200th section.

MESSRS. *S. Thompson* and *J. Fryer* were builders, and contracted with Sir *H. Wilmot* and others, representing a church building committee, to build a church at *Derby*. *Thompson & Fryer*

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afterwards got into difficulties and were unable to perform the contract.

By an indenture, dated the 10th of March, 1865, and made between *Thompson & Fryer*, therein called the debtors, of the first part, *W. T. Cox* and *T. Roe*, thereinafter styled inspectors, of the second part, and the several other persons whose names, or the names of whose firms, were written or subscribed in the schedule thereunder written, and who comprised, or were intended to comprise, all the creditors of the debtors, and were thereinafter styled "the said creditors," of the third part, after reciting that the said debtors were indebted to the said creditors in the several sums of money set opposite to their respective names in the said schedule, which sums they were unable at present fully to discharge, and reciting an agreement that a deed of arrangement should be made: It was witnessed that the said debtors assigned unto the said inspectors all the estate and effects of the said debtors upon trust, when and so soon as it should appear to the said inspectors that all and every of the creditors of the said debtors had been fully paid and satisfied the amount of their respective debts, and that a sufficient amount had been duly set apart and invested for the benefit of such creditors (if any) as for any reason other than the default of the said debtors should not have received the full amount of their respective debts, or sooner in certain events, to reconvey to the said debtors the said estate and effects, or so much as should then remain: And the indenture further witnessed that the said debtors covenanted with the said creditors respectively that the said debtors would duly pay to the said creditors, parties thereto of the third part, and all other (if any) the creditors of them the said debtors, the sum of 8*s.* in the pound within six months, and 4*s.* in the pound within every succeeding six months, until the whole of the debts were paid. The deed also contained provisions for management of the estate by the debtors, with power to the inspectors, in case of default by the debtors or dissatisfaction of the inspectors, to take possession of the estate and realize it, and to hold the proceeds, after payment of expenses and of debts incurred after the date of the deed, upon trust to pay and divide the residue amongst all and every the said creditors, parties thereto, and all other (if any) the creditors of the said debtors

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whose debts had been contracted prior to the date of the deed, and to pay the ultimate surplus to the said debtors: And the said creditors thereby respectively covenanted with *Thompson & Fryer* that they, the said creditors, should not nor would at any time thereafter sue, arrest, attach, take in execution, or otherwise impede or incumber the said *Thompson & Fryer* on account of the said several debts; and if any of them should do so contrary to the intent of the deed, that then *Thompson & Fryer* should be clearly acquitted, exonerated, and for ever discharged of and from all actions, suits, debts, and demands whatsoever of the creditor or creditors by whom he or they should be so sued, arrested, attached, taken in execution, or otherwise impeded or incumbered, and the said deed might be pleaded in bar thereto as effectually as a release under the hands and seals of such creditor or creditors respectively for that purpose might or could be.

The deed was executed, or assented to, by a sufficient number of creditors, and duly registered.

The church building committee claimed damages against *Thompson & Fryer* for breach of their contract, and applied to the Court of Bankruptcy at *Birmingham* to assess the damages without a jury, and the Commissioner made an order referring it to the Registrar to assess the damages, the order being expressed to be by consent. The Registrar, on the 10th of March, 1867, found that the committee were not entitled to any damages, and the committee appealed from this finding.

Mr. *Bacon*, Q.C., Mr. *Chitty*, and Mr. *Huish*, for the Appellants.

Sir *Roundell Palmer*, Q.C., and Mr. *Cracknall*, for the Respondents, took the preliminary objection that this was a consent order, and that therefore no appeal could be allowed. If the Registrar had jurisdiction, it must be under sect. 153 of the Act of 1861, and that did not apply to this case; if he had no jurisdiction, then the order could only be by consent. The deed might have provided for this case, but had not. No claim for unliquidated damages can be allowed under an ordinary trust deed: *Ex parte Mendel* (1); *In re Penton* (2). *Sharland* v. *Spence* (3) and *Strick* v. *De Mattos* (4),

(1) 1 D. J. & S. 330. 10 Jur. N.S. 109.
(2) Law Rep. 1 Ch. 158.
(3) Law Rep. 2 C. P. 456.
(4) 3 H. & C. 22. 10 Jur. N.S. 753

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are in our favour. In *Woods* v. *De Mattos* (1), the Judges had not the case of unliquidated damages in their view. These claimants are not creditors within the meaning of the Act: *Ex parte Godden* (2).

Mr. *Bacon*, Q.C., Mr. *Chitty*, and Mr. *Huish*:—

The Court must have jurisdiction as to the liability of the debtor, as in the case of an ordinary debt. The Legislature has enacted that, besides bankruptcies, there shall be a compulsory arrangement between the creditor and the bankrupt debtor, which is to take effect as in a bankruptcy. This is a debt on contract, and must be taken into account. The word "consent," as used in this order, can only mean consent that the damages are to be assessed without a jury. As to the effect of a consent order: *Cole* v. *Scott* (3).

Sir *Roundell Palmer*, in reply on the objection.

June 17. LORD CHELMSFORD, L.C.:—

The question raised by this Petition of Appeal is, whether the church building committee had a right to come in under the trus deed executed by Messrs. *Thompson & Fryer*, and to have the damages ascertained in respect of an alleged breach of a contract entered into with them.

The deed upon which the Petitioners found themselves is an inspectorship deed between *Thompson & Fryer*, the debtors, of the first part, two inspectors of the second part, and the several other persons whose names, or the names of whose firms, are written or subscribed in the schedule thereunder written, and who comprise, or are intended to comprise, all the creditors of the said debtors of the third part. By this deed the debtors assign to the inspectors all their real and personal estate and effects whatsoever and wheresoever upon trust, when all the creditors have been fully paid, and a sufficient amount has been set apart for the benefit of such creditors (if any) as for any reason other than for default of the debtors shall not have received the full amount of their

(1) Law Rep. 1 Ex. 91. (2) 1 D. J. & S. 260.
(3) 1 Mac. & G. 518.

debts, to re-convey and re-assign the real and personal estate to the debtors; and the debtors covenant to pay to the creditors, parties of the third part, and all other (if any) the creditors of them, the debtors, 8*s.* in the pound in six months, and 4*s.* in the pound every succeeding six months until 20*s.* in the pound is paid. And the deed contains a covenant by the creditors not to sue the debtors for their respective debts, and that if any of them shall do so the debtors are to be acquitted and discharged of all debts and demands whatsoever of the creditors who shall so sue.

The Petitioners claim to be entitled to come in as creditors under this deed, by virtue of the 153rd section of the *Bankruptcy Act*, 1861.

Before this Act, a debt payable upon a contingency might be valued and proved against a bankrupt's estate; but a person having a claim to recover damages for breach of contract by the bankrupt could not come in with the creditors under the bankruptcy. The 153rd section enacts, that "if any bankrupt shall at the time of adjudication be liable by reason of any contract or promise to a demand in the nature of damages which have not been, and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a Court of law," and "the amount of damages when assessed shall be provable as if a debt due at the time of the bankruptcy." I do not exactly understand the meaning of this section. It seems to apply only to cases where the bankrupt admits the breach of his contract or promise, but requires the amount of the damages to to be proved against him, for it speaks of the assessment of the damages as if the breach of the contract or promise was not in question; and I am unable to comprehend what is meant by the words "a demand in the nature of damages which have not been, and cannot be otherwise liquidated or ascertained."

This section is confined to cases of bankruptcy, and therefore it must be wholly inapplicable to trust deeds unless extended by other sections of the Act. The sections relied upon as bringing these deeds within the operation of the 153rd section begin at sect. 192, with a general heading: "As to Trust Deeds for benefit of Creditors, Composition and Inspectorship Deeds executed by

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a Debtor" By sect. 197 it is enacted that after the registration of every such deed or instrument "the debtor and creditors and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of, and be liable to all the provisions of this Act in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy." It was insisted on behalf of the Petitioners that a person who has a claim to unliquidated damages which he has proceeded to enforce under the Act, must be regarded as a creditor who has assented to a deed of this description, or who is bound thereby, and the language of the 192nd section, and particularly the word "liabilities" which it contains, was strongly relied upon. That section enacts "that every deed or instrument made or entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, relating to the debts or liabilities of the debtor, and his release therefrom, or the distribution, inspection, management, and winding-up of his estate, or any of such matters, shall be as valid and effectual and binding on all the creditors of such debtor as if they were parties to, and had duly executed the same." Now, there might be some ground for maintaining that a person with a claim to unliquidated damages would come within the description of a creditor in respect of this species of liability of the debtor, if it were not clear from what follows that this could not have been the intention of the Legislature; for one of the conditions of the validity of such deeds is, that they shall have the assent or approval of three-fourths in value of the creditors, and as the word "creditors" in this part of the section cannot apply to persons who have only a claim to ascertain damages, because no value can be set upon their claim, you cannot in propriety of construction assign a different meaning to it in the former part of the same section, unless it is clear that the intention was to use it in different senses in the two places. This seems not to have been the opinion of the Exchequer Chamber in the case of *Wood* v. *De Mattos* (1), where, upon a trust deed

(1) Law Rep. 1 Ex. 91.

made between the debtor, his inspectors, and "the persons who at the date hereof are respectively creditors of the said *De Mattos*, or who would be entitled to prove under an adjudication of bankruptcy against *De Mattos*, in a Petition filed on the day of the date of these presents," an objection having been raised by a creditor to the validity of the deed, on the ground (amongst others) that the benefit of the deed was extended to persons who were not creditors within the meaning of the trust deed clauses of the Act, inasmuch as it included all who could prove in bankruptcy. *Blackburn*, J., in delivering the opinion of the Court, said: "We think that in the 192nd section" the word 'creditors' "must be understood to mean all persons who had at the time of the execution of the deed a claim against the debtor proveable against his estate if he then became bankrupt." It must be observed, however, that there is a great difference between the question whether a composition deed would be void under the 192nd section, because it expressly provided for the settlement of all the liabilities of a debtor, as well as for what are strictly called debts, and the question before me, whether under the general term "creditors," without explanation of its intended meaning, persons having claims for unliquidated damages would be included, and so would be bound by the agreement of the majority of the creditors whose debts are ascertained, without having the power of assenting to or dissenting from the deed.

I do not think it was necessary for the Court of Exchequer Chamber, in the case of *Wood* v. *De Mattos* (1), to put a general construction on the word "creditors" in the 192nd section. It appears to me that there can be no objection to a trust deed under that section being extended to those who have merely claims to damages, by an explanation stating that they are meant to be included under the term "creditors." The deed, therefore, in that case might be perfectly valid, and yet the decision would not touch the present question.

The real question in this case seems to me to be, whether the trust deed did or did not expressly and in terms provide for the payment of a composition on the Petitioners' claim. If it did, then it placed them on the same footing with other non-

(1) Law Rep. 1 Ex. 91; 12 Jur. N.S. 78

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assenting creditors upon whom the deed would be binding. If it did not, how can the 192nd section bring them within the class either of "parties to the deed," or "who have assented thereto, or are bound thereby," who alone are to have the benefit of, and to be liable to, all the provisions of the Act, in the same or like manner as if the debtor had been adjudged a bankrupt.

If the Petitioners are not within any of these classes, the 153rd section does not apply to their case. If the Petitioners are bound by the deed by reason of their being included in the descriptive term "creditors" in the 192nd section, then this strange consequence would follow:—Supposing the breach of contract to be denied, and not the amount of damages disputed, there may be some doubt whether the 153rd section applies at all; but if it does, it can hardly be said to be a case of a demand in the nature of damages, which cannot otherwise be liquidated and ascertained, because the right to recover, and the amount to which the party is entitled, may both be determined by action, and that would therefore be the mode of ascertaining the amount. But it is expressly provided by the deed in question, that if any action shall be brought by any of the creditors the deed may be pleaded as an acquittance; and, as there is no debt capable of proof until the amount of damage has been ascertained, a debt would in this case have to be created by the very proceedings which the creditors are prevented by the deed from adopting.

Although a person who has a claim to unliquidated damages cannot have that claim ascertained, and so make himself a creditor under a deed of the description in question, yet he would be bound if his debtor proceeded under the 200th section, which provides for a debtor being unable to obtain the assent of a majority of his creditors, and for his executing a deed by which all his estate and effects are conveyed to be applied and administered for the benefit of his creditors, in like manner as if he had been adjudged a bankrupt.

In the case of *In re Penton* (1), Lord *Cranworth* is reported to have said, that sect. 153 of the Act of 1861 applied to the case of deeds as well as to the case of bankruptcies. This must be taken with reference to the nature of the deed in that case.

(1) Law Rep. 1 Ch. 158.

We sent for the register and found that the deed was executed under the 200th section, in the form given in Schedule D. Such a deed when registered is clearly brought within the 153rd section, by the terms of the 197th section of the Act. The observation of Lord *Cranworth* must not be understood as applying to such a deed as the one in question, in which the Petitioners could not have been intended to be, and certainly are not, in terms brought within the class of creditors, and therefore the Registrar had no jurisdiction to proceed under the 153rd section. He could only act in the matter by consent of the parties, and consequently there can be no appeal from his order. The Petition of appeal must be dismissed with costs.

SIR G. J. TURNER, L.J. :—

This was an application to assess unliquidated damages under the 153rd section of the *Bankruptcy Act* of 1861, with a view to the claimants coming in as creditors under a deed of composition and trust, or inspectorship.

This application must rest on the combined effect of the deed and the statute, for apart from such combination there is no jurisdiction in bankruptcy to determine what creditors are or are not entitled to the benefit of the deed.

Then are these claimants entitled, under the combined effect of the deed and statute, to have damages assessed, and to come in as creditors under the deed for the amount at which the damages may be assessed.

To determine this we must consider, first, the effect of the deed. Without entering into details it is abundantly clear that the claimants are not creditors within its powers. Both the recitals and the operative part shew plainly that the deed has reference only to creditors at the date of the deed, and the claimants were not creditors at that date, as their claim was then for unliquidated damages only. It was said that the deed was to be construed with reference to the statute under which it was to take effect. But the deed does not in terms mention the statute, and even if it did, it might well operate under the statute without giving to the word "creditors" any other than its common and ordinary meaning.

Does then the statute assist the case of the claimants? In my

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opinion it does not. The case depends upon the 153rd section and the 197th section, and the sections in connection with the 197th. There can be no doubt that under the 153rd section unliquidated damages may be proved in bankruptcy, and this brings us to the operation of the 197th section, and the sections connected with it. The 197th section describes the deeds or instruments to which it refers, "as every such deed or instrument," and we are then driven to the 192nd section to see what these deeds or instruments are; but in this section we find nothing to extend the meaning of the word "creditors" beyond its common and ordinary meaning. On the contrary, it seems to me to be clear that the word "creditors" has been used in its ordinary sense, and Articles 1 and 5, I think, prove this to demonstration. The reference to debts and liabilities does not, I think, in any way alter this. These words refer to the subject of the arrangement, not to the persons with whom it might be made.

But there is yet a more important observation to be made upon this section. The word "creditors" occurs twice; first, as to the persons with whom the covenant is to be made; and, secondly, as to persons to be bound by it. And if, as the context proves to be the case, actual creditors are intended where the word first occurs—how can a different construction be put upon the word where it secondly occurs, when there is no context to impart a different meaning.

Taking, then, the word "creditors" in this 192nd section to mean actual creditors, it is surely most reasonable, if not actually necessary, to put the same construction upon the word in the 197th section.

It may be well, however, further to examine this 197th section.

It is divided into three parts. In the first part we have the words: "who have assented thereto or are bound thereby," thus bringing it nearer to the language of the 192nd section, on which I have already commented. Then, in the second part we have the words: "the law and practice in bankruptcy, so far as they may be applicable;" and how is the law and practice of bankruptcy to be applicable to a deed, the provisions of which are at variance, as the provisions of this deed manifestly are, with that law and practice, and how is the law and practice of bankruptcy as to

unliquidated damages to be applied to a deed providing only for present debts.

Some cases were referred to in the course of the argument: *Ex parte Mendel* (1), *In re Penton* (2), and *Wood* v. *De Mattos* (3). The two former of these cases, have, I think, no application to the present case, as they were Schedule D. deeds, under which the assets would be administered as in bankruptcy; and as to *Wood* v. *De Mattos*, I hardly think the learned Judges who decided that case could have meant their observations to extend to claims for unliquidated damages, which were in no way under their consideration.

It has not escaped my attention that the conclusion at which I have arrived makes a distinction between trust deeds and bankruptcy, and will leave the debtor liable for unliquidated damages, notwithstanding the provisions of the 153rd section; but I see no reason why this may not be the case, and may not have been intended, as the debtor and creditors might, if he and they were willing, have come to an arrangement with such claimants; and if they were not willing, it is difficult to see why they ought to be bound when they would not have the benefit of the administration of the assets in bankruptcy. Upon the whole, I think this claim wholly unfounded, and that the Petition should be dismissed with costs.

LORD CAIRNS, L.J.:—

The only question argued before us on the preliminary objection to the competency of this appeal was the question of the jurisdiction of the District Court of *Birmingham*, under and by virtue of the statute, to make the order of the 12th of March, 1867. If the Court had jurisdiction by statute to make the order, the order, like any other order of the Court, would, of course, be subject to appeal; but, on the other hand, if the Court had no jurisdiction except by the consent, either express or tacit, of the parties, then like any other order made under consensual jurisdiction there would be no appeal given by the statute from the order of the Court. The Appellants assert that the debtors contracted with them to build

(1) 1 D. J. & S. 330. (2) Law Rep. 1 Ch. 158.
(3) Law Rep. 1 Ex. 91.

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a church, and made default under the contract before the date of the deed in question, and that they, the Appellants, have a claim for damages in respect of the broken contract.

Now the argument assumed—it is the condition of the argument that it must assume—that the deed in question is a valid deed under the 192nd section of the *Bankruptcy Act*. If the deed is not a valid deed under that section, there is, of course, an end of the case. On the other hand, if it is a valid deed under the section, then, in my opinion, all that is done by that section, and the following sections of the Act, is to give the Court jurisdiction over the contract as it affects the deed. The Court has to take the contract, which is contained in the four corners of the deed, and to see that the contract is properly administered and carried into execution; but the sections in the statute do not, as I think, give any power to make any new contract other than that which is contained in the deed between the debtor and his creditors. The first question, therefore, seems to me to be, what is the contract which is made by the deed? Now, without again referring to the provisions of the deed, it appears to me, that taking the definition of the parties to the deed, taking the covenant in the deed for the payment of the debts of the debtors by instalments, taking the provisions of the deed for the administration of the estate of the debtors in the event of the covenant to pay the instalments not being fulfilled,—there is throughout the deed a clear and distinct manifestation of an intention that the debts to be provided for are debts in the ordinary and proper acceptation of the term debts contracted and debts which have to be paid in a liquidated sum of money by virtue of the contract, and that it is utterly impossible, if the question rests upon the construction of the deed, to hold that there are in the four corners of the deed any provisions for the payment of that which is not a debt, but may be the result of an action or other proceeding brought for the breach of the contract. Well, if that be so upon the deed, there will, as I think, be an end of the case.

But the argument, and the strong argument, which was pressed upon us was on this point. It was said that, although the proper meaning of the term "debtor and creditors," be such as I have said in the construction of the deed, yet inasmuch as the deed

is intended to have effect under the statute, you must go to the sections of the statute, and then you will find a large classification of the term "debtor and creditors," large enough to include the claim which was made in this case for unliquidated damages; and then the argument further proceeded to say that, commencing with the 192nd section, you find there the terms "debtor and creditors" and "liabilities," and then you must construe the 192nd section by the 153rd, which provides in the case of bankruptcy for unliquidated damages. Now, coming to the 192nd section, I must say that, in my opinion, nothing can be more clear than this, that if that section stood alone, it is a section which deals with the deed as a deed between debtor and creditors only, in the ordinary acceptation of the term, and contemplates a provision made by the deed for the benefit of creditors in the ordinary acceptation of the term. It is quite true that the word "liabilities" is used in that section; but then, according to the bankruptcy law as it then stood under the Act of 1849, there was a series of claims against a bankrupt which, under the Act, were liabilities, and which obviously are the species of liability referred to in sect. 192, viz., liabilities to pay money upon a contingency which shall not have happened, and I say that obviously those are the liabilities intended by the 192nd section, for this plain reason, that they are liabilities as to which you could ascertain whether a majority of persons who had claims on such debtor assented to or dissented from the deed, whereas, with regard to liabilities for unliquidated damages, you never could ascertain whether there was an assenting or dissenting majority. But then it is said that the 153rd section must be read into the 192nd section, and enlarge the terms "debtor and creditors," and "liabilities" in the latter section. Now, the argument seems to me to proceed on an entire fallacy. The 153rd section, no doubt, makes a provision for the ascertainment of damages upon a claim for unliquidated damages, and a person having established such a claim is called a creditor, but it is not until that process is gone through, that the term "proof," or the term "debt," or the term "creditor," can be held to be used with reference to unliquidated damages. But the 192nd section must be construed, not after proof has been made, but at the time the deed is entered into;

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and, for the reasons I have already expressed, it is impossible, according to any principle of construction, to call a claim for unliquidated damages a debt within the meaning of the section. I think, therefore, that the 153rd section, difficult as it is of construction, is certainly upon no construction to be imported into the 192nd section, so as to enlarge the natural meaning of the words in that section.

My opinion is, therefore, that all that was done by the District Court of Bankruptcy at *Birmingham* under the order that was made, was done by virtue of the consent of the parties that the question of unliquidated damages should be dealt with by the Commissioner or his deputy, and that the jurisdiction exercised was not given him by the statute, and that, therefore, no appeal lies. I think, therefore, that the appeal which has been opened before us must be dismissed, and dismissed with costs.

Solicitors for the Appellants: Messrs. *Rickards & Walker*, agents for Messrs. *Simpson, Taylor, & Simpson, Derby.*

Solicitor for the Respondents: Mr. *F. C. Greenfield.*

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Set-off in Bankruptcy—Solicitor's Lien.

An adjudication in bankruptcy obtained by *D.* against *C.* was set aside, and *D.* was ordered to pay *C.* his costs, for which, if not paid when taxed, *C.* was to be at liberty to issue execution. *D.* then executed an assignment to trustees for his creditors in the form of Schedule D to the Bankruptcy Act, 1861. The costs were afterwards taxed. *C.*, at the date of the deed, owed *D.* a sum exceeding the amount of the taxed costs. If *C.*, who had not acceded to the deed, was reckoned as a creditor of *D.* for the amount of taxed costs, the deed was not assented to by the requisite majority of creditors. *C.*'s solicitor had not been paid his bill of costs in the bankruptcy proceedings, and claimed his lien on the costs payable by *D.*:—

Held, that *C.*'s solicitor was entitled to a lien on the costs ordered to be paid to *C.* by *D.*, and that therefore the debt due from *C.* to *D.* could not be set off against them:

Held, further, that *C.* ought to be allowed to issue execution for the costs, for that if he was, in respect of those costs, a creditor of *D.* within the meaning of the *Bankruptcy Act*, 1861, s. 192, the deed was not assented to by the

majority requisite to bind non-assenting creditors; and if he was not such a creditor, the deed did not apply to his claim, so that in neither view could he be affected by the deed.

THIS was an application by way of appeal from the Registrar sitting for the Commissioner in the District Court of Bankruptcy at *Liverpool*, who refused leave to issue execution upon a process obtained by *Cleland* against *Davies*.

On the 8th of February, 1867, *Cleland* was adjudicated bankrupt, on the Petition of *Davies*, by the Registrar sitting for the Commissioner, and on the 20th of the same month this adjudication was confirmed by the Commissioner. On the 15th of March, the Lords Justices annulled the adjudication, on the ground that *Cleland* was not a trader (1), and ordered *Davies* to pay *Cleland* his costs, occasioned by the Petition for adjudication, and by the appeal, such costs to be taxed by the Master of the Court of Bankruptcy; and it was ordered that *Cleland* should be at liberty to enforce the order for payment of costs by issuing execution if they were not paid on taxation. These costs were taxed and allowed in the month of May, 1867, at the sum of £159 17*s.* 8*d.*, the certificate of taxation bearing date the 7th of May.

Before the taxation a deed was executed by *Davies*, under the *Bankruptcy Act*, in this form:—"This deed, made the 6th of April, 1867, between *Evan Davies*, of &c., of the one part, and *Peter Jones*, of &c., and *John Lewis*, of &c., on behalf and with the assent of the under-mentioned creditors of *Evan Davies*, of the other part, witnesseth, that *Evan Davies* hereby conveys and assigns all his estate and effects to *P. Jones* and *John Lewis* absolutely, to be applied and administered for the benefit of the creditors of *Evan Davies*, in like manner as if the said *Evan Davies* had been at the date hereof duly adjudged a bankrupt." This deed was registered on the 9th of April. *Cleland* neither executed nor assented to it. It was assented to by the requisite majority of creditors if the above claim for costs was omitted from the list of debts, as was the case in the statement of accounts delivered to the Chief Registrar; but treating *Cleland* as a creditor for £159, the assent of the requisite majority had not been obtained. At the time the deed was executed *Cleland* was indebted to *Davies*

(1) Law Rep. 2 Ch. 466.

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in the sum of £256 2*s.* 9*d.*, being the debt in respect of which *Davies* had instituted the bankruptcy proceedings against him.

On the 10th of July, 1867, *Cleland* applied to the Court of Bankruptcy for the *Liverpool* district for leave to issue execution. On the 12th the Registrar delivered judgment, refusing the application with costs, on the ground that the £256 2*s.* 9*d.* ought to be set off against the costs; and observing that this was an attempt to invert the order of things by allowing a debtor to issue execution against his creditor.

Mr. *De Gex*, Q.C., and Mr. *Locock Webb*, for the appeal motion:—

If *Cleland's* claim for costs is to be treated as a provable debt, the requisite statutory majority of creditors has not been obtained, and the deed is invalid as against non-assenting creditors. If the claim is not a provable debt, the deed does not touch it. So in no view can the deed take away *Cleland's* right to issue execution, unless the right to set-off can be maintained. There is no set-off in such a case: *Ex parte Rhodes* (1); *Ex parte Bryant* (2). The lien of *Cleland's* solicitor on the costs prevents set-off.

Mr. *Yate Lee*, for *Davies*:—

The claim for costs is a debt provable (Bankruptcy Act, 1849, s. 181; *Bankruptcy Act*, 1861, s. 149), and therefore is a debt within the Act of 1861, s. 192: *Wood* v. *De Mattos* (3). But by sect. 171 of the former Act, where there are cross demands the creditor can only prove for the balance. The balance is against *Cleland*, so that his debt cannot be reckoned in computing the statutory majority. He is bound by the deed, and therefore cannot be allowed to issue execution: *In re Thatcher* (4). The cases referred to against the set-off are under old Bankruptcy Acts; not containing the same provisions as the more recent ones. The clause giving a set-off puts the debts on the same footing as if, there being no bankruptcy or statutory deed in the case, the demands were connected, in which case the solicitor's lien does not interfere with the right, though it does in the case of unconnected demands: *Throckmorton* v. *Crowley* (5).

(1) 15 Ves. 539.
(2) 2 Rose, 237.
(3) Law Rep. 1 Ex. 91, 100.
(4) Ibid. 2 Ch. 93.
(5) Law Rep. 3 Eq. 196.

Mr. *De Gex*, in reply:—

The mutual credit clauses cannot have been intended to interfere with the solicitor's lien; nor do their words, on a just interpretation, bear such a construction.

[The LORD JUSTICE LORD CAIRNS:—Is there any evidence to shew that the solicitor has not been paid. In all the cases which I remember on the subject the solicitor has intervened.]

I am instructed that he has not been paid, and that there is no doubt he will be ready to make an affidavit to that effect if the Court will allow it. The claim to lien is supported by *Hanson* v. *Reece* (1), and *Alliance Bank* v. *Holford* (2). The statute 23 & 24 Vict. c. 127, s. 28, gives a solicitor an express lien on any sum of money recovered by his exertions. How can a set-off be allowed so as to defeat this statutory title? *Cleland's* claim being for unliquidated damages is not a provable debt at all, and he, therefore, is not bound by the deed: *Ex parte Wilmot, Re Thompson* (3).

[The LORD JUSTICE LORD CAIRNS:—In that case a distinction is made throughout between a composition deed and a deed by which a debtor makes over all his effects to be administered as in bankruptcy.]

Yes; but it is against the scope of the Act to allow unliquidated demands to be proved.

Judgment was reserved; the Court giving leave to produce an affidavit by *Cleland's* solicitor, that his costs in the bankruptcy proceedings had not been paid. Such an affidavit was accordingly made.

Aug. 6. LORD CAIRNS, L.J., after stating the facts of the case, continued:—

The result then is, that *Cleland* was entitled to receive under process, consequent upon the taxation, a sum of £159 17*s.* 8*d.* from *Davies*, and, on the other hand, *Davies* was entitled to a debt of £256 due to him from *Cleland*.

(1) 6 W. R. 46. (2) 16 C. B. (N. S.) 460. (3) Law Rep. 2 Ch. 795.

L. J. C. 1867 *Ex parte* CLELAND. *In re* DAVIES.

Now, if no deed had intervened, and no bankruptcy had intervened, it is quite clear that, according to the ordinary principles of equity, these are not claims which could have been set off. The process for the costs might have been executed, and it would have been no defence to that process to have made a claim in respect of the debt due from *Cleland* to *Davies*.

It is contended, however, that by reason of this deed having submitted the estate of *Davies* to administration of the same character as in bankruptcy, and by reason of the provisions in bankruptcy as to set-off, the claim for costs should be set off against the debt, the result of which would be to wipe out the claim for costs, and to make *Davies* no longer indebted to *Cleland*. For the purpose of the argument I assume, though it is not necessary to decide it, that the costs in this case, although not taxed till after the date of the deed, would, in a bankruptcy occurring as at the date of the deed, be provable; and I assume that, in like manner, they would be provable under the deed. But the question remains:—can they be set off against the debt of £256? The solicitor of *Cleland* has, in my opinion, clearly a lien for these costs. He has, by permission of the Court, made an affidavit, stating that his costs remain unpaid, that he claims a lien, and that the proceedings which were taken by process for the costs, were proceedings intended to give effect to his lien, and to recover the costs for his benefit. The debt or claim, therefore, for costs, is not the debt or claim of *Cleland* alone, it is in the view of a Court of equity, and upon the principles of a Court of equity, a debt or claim which has been assigned or encumbered, and the persons entitled to it now are not *Cleland* alone, but *Cleland* and his solicitor, the claim of the solicitor being paramount to that of *Cleland*. That consideration, in my opinion, renders it impossible that the costs can be set off against the debt. It would be impossible, as I have already stated, that there could be such a set-off out of bankruptcy, and still clearer is it that there could be no such set-off in bankruptcy.

The principle of set-off in bankruptcy was explained with great clearness in the case of *Forster* v. *Wilson* (1), where Mr. Baron *Parke* said: "The right of set-off in bankruptcy does not appear

(1) 12 M. & W. 191, 203.

to rest on the same principle as the right of set-off between solvent parties. The latter is given by the Statutes of Set-off (2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24, s. 4), to prevent cross actions; and if the Defendant could sue the Plaintiff for a debt due to him, not in his representative character, he might set it off under these statutes in an action by a Plaintiff suing in his individual character also, though the Plaintiff or Defendant might claim their respective debts as a trustee for a third person. If the debts were legal debts, due to each in his own right, it would be sufficient. But under the Bankrupt Statutes, the mutual credit clause has not been so construed. The object of this clause (originally introduced in a temporary Act, 4 & 5 Anne, c. 17; continued by 5 Geo. 2, c. 30; and now re-enacted by the 6 Geo. 4, c. 16) is not to avoid cross actions, for none would lie against assignees, and one against the bankrupt would be unavailing; but to do substantial justice between the parties where a debt is really due from the bankrupt to the debtor to his estate, and the Court of Queen's Bench, in construing this clause (for it is the same clause in substance in the two last-named statutes) have held that it did not authorize a set-off where the debt, though legally due to the debtor from the bankrupt, was really due to him as a trustee for another; and, though recoverable in a cross action, would not have been recovered for his own benefit. This appears to have been the main ground of the decision in the case of *Fair* v. *M'Iver* (1), and we conceive that the principle of that decision was correct." Those observations appear to me to apply entirely to the present case, and to make a set-off impossible. The costs, though recoverable in the name of *Cleland*, and though ordered to be paid to *Cleland* by name, are paid to him, not for his own benefit, for he could not take the money and spend it; but are to be paid to him subject to the lien of his solicitor, and are, therefore, to be held by him, either in whole or in part, as a trustee for his solicitor. In my opinion, therefore, there was no set-off which could be asserted under this deed, or at the time of the execution of the deed.

There being no set-off, the result is, that at the date, and after the date of the deed, there was a sum due in respect of these

(1) 16 East, 130.

L. J. C. 1867 *Ex parte* CLELAND. *In re* DAVIES.

costs, subject to taxation, which was afterwards ascertained to be £159 17*s.* 8*d.* Now it may well be (but it is not necessary to decide it in the present case) that this was such a demand as the trustees of the deed would be warranted in paying, but the question is, whether the person entitled to these costs was bound by the provisions of the deed. Then, as it seems to me, *Davies* and those who represent him are in this dilemma: either the person entitled to the costs is a creditor within the meaning of the 192nd section of the *Bankruptcy Act*, or he is not. If he is such a creditor, then there is not an adequate majority within the terms of that section. If, on the other hand, he is not a creditor within the meaning of the section, then he is not restrained by any provisions of that or the following sections from issuing any execution to which he is entitled. In either view, therefore, the question of set-off being put out of the case, the 192nd and following sections offer no impediment to any execution for costs to which *Cleland* is entitled; and, in my opinion, coming to the Court for leave, he was entitled to have that leave given to him, and an order must be made to that effect.

I think there ought to be no costs of the appeal, because, among other reasons, evidence was allowed to be adduced which, in point of form, was wanting to complete the case of the Appellant. I think the order which the Court below ought to have made, was for leave to issue execution without any order as to costs, because the applicant was coming to the Court below, not, I think, to obtain that which was absolutely necessary, but coming for an order to clear away a doubt which might exist as to his right to issue execution.

Solicitor for *Cleland*: Mr. *F. P. Chappell.*
Solicitors for the Respondents: Messrs. *J., T., & R. Gole.*

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See REVIVOR FOR COSTS.

ACCEPTANCE OF SHARES, *when complete—Company—Winding-up—Contributory—Executor.*] The directors of a joint stock company offered their reserved shares to shareholders, and the executors of deceased shareholders, in proportion to the amount of their shares. The form of application sent to the executors of one of the deceased shareholders was filled up by *M.*, who was a relation of the surviving executrix, without her authority; and he therein asked for new shares to be allotted to himself. The directors allotted the additional shares to the executors, but sent the notice of the allotment to *M.* *M.* wrote a letter thanking them for the shares, but did not pay the deposit on them. The company was shortly afterwards wound up:—

Held (reversing the decision of *Kindersley*, V.C.), that there was no complete contract between *M.* and the company that he should take the shares; and that he could not be placed on the list of contributories.

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ACCOUNTS *between Partners—Partnership—Dissolution—Profits.*] By the agreement between two partners, each was to have interest at 5 per cent. on his share of the capital, and the profits were then to be equally divided between them.

A decree was made for a dissolution and a sale of the partnership property; but the business was carried on for some time afterwards until the property was finally sold:—

Held, that after the dissolution, interest was no longer payable under the agreement; and that in the division of the proceeds of the sale each partner would take what was found to be his share of capital at the time of the dissolution, with the accumulations thereof, and that the residue must be equally divided between them.

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AFFIDAVIT *accompanying Composition Deed—Composition Deed—Registration—Bankruptcy Act*, 1861, *s.* 192—*Order of* 22*nd May*, 1862.] A debtor, who had executed a trust deed, having refused to make the required affidavit, which was accordingly made by another person acquainted with the facts:—

Held, on an *ex parte* application by one of the trustees, that the Court had power to dispense with the General Order of the 22nd of May, 1862, which requires an affidavit by the debtor; and the deed was ordered to be registered.

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AGREEMENT TO ACCEPT PART OF DEBT IN DISCHARGE OF THE WHOLE—*Penalty—Proviso reviving original Debt—Trust to raise Money by Mortgage.*] An agreement was entered into between debtor and creditor that the amount due should be taken at £72,000, that the debtor should pay £21,000 on a certain day, and give by a certain day a first mortgage on a certain estate for £30,000, and that, if he did so, the payment and mortgage should be taken in satisfaction of the whole claim; but if he failed in doing so, the creditor was to be at liberty to recover the whole £72,000. This agreement was shortly afterwards modified, making the payment in cash £33,000, and the mortgage £18,000; the mortgage-money to be payable by two yearly instalments, and the agreement was expressed to be "without prejudice to the right" of the creditor to recover the whole debt in case the principal and interest to be secured by the mortgage were not duly paid on the respective days appointed in the mortgage deed for payment thereof. The £33,000 was paid, and a mortgage duly given for the £18,000, containing a proviso that the debtor should not dispute the right of the creditor to recover the whole sum, except on payment of the mortgage-money, "on or before, but not after," the days appointed for payment thereof:—

Held, by the Lord Chancellor (affirming the order of the Master of the Rolls), that, although a creditor may effectually agree with his debtor to accept a mortgage for less than the whole demand in satisfaction of the whole, with a proviso that if the money is not paid to

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the day he shall be remitted to his whole demand; yet, in the present case, under the agreement, the payment of the £33,000, and the giving the mortgage, were all that was necessary to bar the right of the creditor to recover the larger amount, and that the stipulation in the mortgage deed entitling him to do so, if the mortgage-money was not paid to the day, was in the nature of a penalty, against which the Court would relieve, such proviso not being any part of the original agreement: *dissentiente* the Lord Justice *Turner*, who was of opinion that the transaction was one in which the creditor agreed to accept a smaller sum, if paid to the day, in satisfaction of a larger subsisting demand, and that the doctrine of penalties did not apply.

Property on which *A.* had a mortgage was conveyed to trustees in trust to raise £75,000, to pay off the incumbrances prior to *A.* *A.* paid off and took transfers of the incumbrances, paying £75,000 in all for principal and interest. The trustees then by a deed to which the mortgagor was a party, assigned the £75,000 raisable under the trust deed to *A.*, with all interest to become payable on it, and conveyed the property to *A.*, subject to redemption on payment of £75,000 and interest;—

Held, that this was not a mortgage under the trusts, and that, as against incumbrancers prior to this last deed, *A.* could only stand as a transferee of the incumbrances which he had paid off, though as against the mortgagor and incumbrancers subsequent to the last-mentioned deed, *A.* was entitled to the whole £75,000 and interest.

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See SALE OF REVERSION.

ANNUITY, PAYABLE OUT OF CORPUS—*Will.*] A testator directed his trustees to convert and invest his property, and "with and out of the interest, dividends, and annual proceeds thereof, levy and raise the annual sum of £100," and pay it to his mother for life, "and from and after the payment of the said annual sum of £100, and subject thereto," he declared that the trustees should stand possessed of his said trust moneys, stocks, funds, and securities, upon the trusts thereinafter mentioned.

The income of the whole estate being insufficient to pay the annuity:—

Held (reversing the decision of *Stuart*, V.C.), that the deficiency must be paid out of the *corpus*.

Held, by Lord *Cairns*, L.J., *dubitante Rolt*, L.J., that the terms in which the annuity was given would not, apart from the terms of the gift over, have been sufficient to charge it on the *corpus*, or on the income accruing after the death of the annuitant.

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ANNULLING ADJUDICATION *on Bankrupts' Petition—Bankruptcy—Delay.*] A creditors' assignee applied for an order to annul an adjudication made on the bankrupts' own application, in order that an adjudication by a creditor might be obtained for the purpose of impeaching certain mortgages, comprising the whole of the assets, as being fraudulent preferences or acts of bankruptcy. The assignee had been aware of the existence of the mortgages and that they exceeded the value of the property comprised in them, for nearly three months

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before he expressed any intention of impeaching them, and for more than four months before he made his application :—

Held (reversing the decision of the Commissioner), that the delay was fatal to the application, inasmuch as there had been enough to put the assignee on inquiry whether the mortgages did not comprise the whole assets, and he might at any time have had the bankrupts examined as to the state of their property.

Per Lord *Cairns*, L.J. :—*Semble*, an adjudication made on the application of a bankrupt may, in a proper case, be annulled without his consent.

Ex parte DAVIS & DENTON. *In re* DAVIS & DENTON 363

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ASSETS *of wound-up Company—Jurisdiction to recover—Winding-up Order—Joint Stock Companies Act*, 1856—21 & 22 *Vict. c.* 60, *s.* 11 *—Transfer of Assets—Shareholders.*] When a company is being wound up under the *Joint Stock Companies Act*, 1856, the proper mode of recovering its assets in the hands of contributories is by a proceeding under the winding-up, and not by a suit, jurisdiction being given by 21 & 22 Vict. c. 60, s. 11.

The *A.* company, a limited company, with all its shares fully paid up, sold its business and property to the *B.* company, and, as part of the consideration, 950 shares in the *B.* company were divided among the shareholders of the *A.* company. The *A.* company was afterwards ordered to be wound up in the Court of Bankruptcy :—

Held (affirming the decision of the Master of the Rolls), that the *A.* company and its official liquidators could not maintain a suit in equity against the shareholders who had been placed upon the list of contributories to have the 950 shares in the *B.* company transferred to the official liquidators as assets of the *A.* company.

A winding-up order under the *Joint Stock Companies Act*, 1856, is not invalid because founded on neglect to pay on a demand of the petitioning creditor in excess of what was actually due to him.

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BILL OF LADING—Stoppage *in transitu* 332
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BILL OF PEACE—*Pleading—Demurrer—Discretion.*] Where a large number of persons have similar legal claims against one, he can, by a bill filed against some of them, restrain the proceedings of all until the question as to the validity of the claims has been decided.

Where a Judge has considered that the question raised by a bill ought not be decided on demurrer, the Court of Appeal will not ordinarily overrule his decision.

SHEFFIELD WATERWORKS *v.* YEOMANS 8

2. —————— *Commoners—Crown Survey and Grant—Evidence—Costs of Appeal.*] A bill will lie against the lord by one copyholder, on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such a bill.

Where a manor formerly belonged to the Crown, a grant and survey

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recorded in the Augmentation Office is not evidence for the tenants against the lord.

Where a decree is made by the Court of Appeal, reversing the decree of the Court below, and dismissing the bill with costs, the costs of the appeal will usually be given.

Decree of the Master of the Rolls reversed.

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CALL, *Amount of, in Winding-up—Discretion—Companies Act*, 1862, *s.* 102.] The 102nd section of the *Companies Act*, 1862, does not oblige the Court to put off making a call until the claims made against a company which is in course of winding-up have been established as debts.

The Court of Appeal will not, unless a strong case is made, interfere with the discretion of the Judge to whose Court the winding-up is attached, by reducing the amount of a call ordered by him.

Order of *Stuart*, V.C., affirmed.

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CERTIFICATE OF INLAND REVENUE OFFICE—*Legacy or Succession Duty—Trust for Sale—Succession Duty Act*, 1853, *s.* 51—*Vendor and Purchaser.*] Where trustees for sale under a will, who had entered into a contract with a purchaser, and paid legacy duty on the amount of the purchase-money, afterwards vested the estate in the person to whom (subject to the trust) the land was devised, whereby he became the proper party to convey, *semble*, that succession duty, and not legacy duty, ought to have been paid.

Held (affirming the decree of the Master of the Rolls), that a certificate from the Inland Revenue Office that the duty was paid, discharged the land, and that the purchaser could require no further evidence on the subject.

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CHAMPERTY—*Purchase for Purpose of setting aside Agreement—Specific Performance—Relief against Persons not parties to the Contract.*] The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced in equity.

A purchaser cannot, before completing his contract, enforce any equities attaching to the property against persons not parties to the contract. Therefore, where a purchaser filed a bill for specific performance, and added as Defendants persons claiming under a previous agreement which the bill sought to impeach:—

Held (affirming the decision of the Master of the Rolls) that the bill could not be sustained.

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CHANGE OF NUISANCE—*Nuisance—Prescriptive Right.*] The Defendant, the owner of an ancient paper mill where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material. For more than twenty years before this change the refuse arising from the paper manufacture had been discharged into a stream which ran past the Plaintiff's house:—

Held, that the easement to which the Defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not increasing the pollution, and that the onus lay on the Plaintiff to prove any increase of pollution.

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CHARITY ABROAD *founded in England—Charity Commissioners—Jurisdiction*—16 *&* 17 *Vict. c.* 137, *s.* 66.] The authority of the Charity Commissioners extends to charities founded and endowed in *England* or *Wales*, although the revenues are applied abroad.

And, *semble*, their authority also extends to charities which are founded and endowed abroad, if their revenues are applied in *England* or *Wales*.

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COMMISSIONERS OF SEWERS—*Taking Land—Formal Adjudication*—57 *Geo.* 3, *c.* xxix.] The Commissioners of Sewers, acting under the powers of 57 Geo. 3, c. xxix. cannot take compulsory the whole of a house unless they have formally adjudged that possession of the whole is necessary for the purpose of executing their powers.

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CONDITIONS OF SALE—*Vendor and Purchaser—Right to rescind—Misrepresentation—Underlease.*] Where a sale takes place under a condition providing that if the purchaser makes any requisition which the vendor is unable or unwilling to comply with, the vendor may, by notice in writing, annul the sale, the vendor may, if the purchaser insists upon a requisition, after being informed that the vendor is unable to comply with it, rescind the sale by notice, and such notice need not give the purchaser a time within which to waive his requisition.

A vendor entitled to an underlease for a term of twenty-four years, less three days, put up the property for sale, as held under a lease for twenty-four years, relying on the promise of the persons entitled to the three days to concur. They afterwards refused to concur:—

Held, that the vendor could not be considered to have made a misrepresentation, so as to disentitle him to the benefit of the above condition.

Decree of *Stuart*, V.C., varied.

DUDDELL *v.* SIMPSON 102

CONFLICT OF LAW—Foreign ship—Mortgage—Sale 282

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CONSIDERATION for family arrangement—*Quantum* immaterial .. 294

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CONTRACT TO ALLOT SHARES—*Specific Performance—Damages—Cairns' Act* (21 & 22 *Vict. c.* 27)—*Liability of Directors.*] The Plaintiff by his bill prayed the specific performance of a resolution passed by the board of directors of a railway company, under which he alleged that he was entitled to have a certain number of shares allotted to him; and he also prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages. All the shares had been allotted before the filing of the bill:—

Held, that as no relief by way of specific performance was possible, the Plaintiff's claim for damages under *Sir H. Cairns' Act* (21 & 22 Vict. c. 27) failed also.

Decree of *Stuart*, V.C., affirmed.

In such a case the Plaintiff's claim against the directors to be indemnified out of their shares was only a claim for damages in another form.

Per CAIRNS, L.J.:—Directors are agents of the company, and their personal liability in a suit, upon a contract made by them, must be governed by the ordinary law of principal and agent. But a shareholder may sustain a bill against directors personally, where he charges them as trustees, and seeks redress against them for a breach of duty to the company of which he is a member.

FERGUSON *v.* WILSON 77

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See EXTRADITION.

CONVENIENCE OF PUBLIC—Defence of railway company to specific performance 147
See PUBLIC CONVENIENCE.

CONVERSION—*Will—Direction to sell at discretion—Tenant for Life and Remainderman—Authorized and unauthorized Investments.*] A testator directed his executors to convert his personal estate when and in such manner as they should see fit, and gave them power to sail his ships for the benefit of his estate, till they could be satisfactorily sold. He gave his residuary estate to tenants for life, with remainders over, and gave his executors power to invest at their discretion, or allow to remain as then invested, all his funds in certain specified shares and securities. His ships gained considerable earnings after his death; and he had, at his decease, large sums invested in such shares and securities as he had specified, and large sums invested in shares and securities of other descriptions, and not proper for the investment of trust moneys:—

Held (affirming the decision of the Master of the Rolls), that the tenants for life were not entitled to the earnings of the ships as income; but (varying that decision) that they were entitled to interest at £4 per cent. on the value of the ships from the testator's death:

Held (reversing the decision of the Master of the Rolls), that the tenants for life were entitled to the actual income of so much of the estate as was invested in such shares and securities as were mentioned by the will as proper investments:

Held (affirming the decision of the Master of the Rolls), that the tenants for life, as regarded the unauthorized investments, were entitled only to an income from the testator's death equal to the dividends of the consols which would have been produced by a sale and investment in consols at a year from the death, and not as in *Robinson* v. *Robinson* (1 D. M. & G. 247) to an income equal to interest at £4 per cent. on their value.

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COSTS OF PROSECUTION *of Accomplices of Bankrupt—Prosecution for Misdemeanor—Bankruptcy Act*, 1861, *ss.* 221, 223.] Where a prosecution is directed against a bankrupt for a misdemeanor under the 221st section of the *Bankruptcy Act*, 1861, the costs, not only of the prosecution of the bankrupt, but also of the prosecution of his accomplices, will be allowed out of the Chief Registrar's Account.
In re LEVI 493

COVENANT, *Action on, against Heir and Devisees in Trust—Debt—Fraudulent Devises, Statute of*—3 *Wm. & M. c.* 14—*Equitable Estate—Alienation—Statute of Limitations*—3 *& 4 Will.* 4, *c.* 42—*Payment by Party liable.*] *E.* covenanted that he, in his lifetime, or his heirs, executors, or administrators, within three months after his death, would pay a sum of £3000.

He died, having devised certain real estate to trustees in trust for *T. E.* for life, with remainders over, and other real estate to the same trustees for payment of debts.

The trustees, under an order of Court, conveyed the estate to new trustees, *H.* and *T.*, who became the legal personal representatives of the testator, and *T. E.*, the tenant for life, mortgaged his estate :—

Held that, after the death of the covenantor, an action of debt would lie upon the covenant:

That the action would lie against the trustees under the will and the heir, by 3 Wm. & M. c. 14, s. 3, and execution would be thus obtained against the land; and that the conveyance to new trustees was not such an alienation as would, under s. 7, prevent the action; nor was the mortgage by the equitable tenant for life such an alienation, though, *semble*, a Court of equity would protect the mortgaged interest against execution:

That the same conclusions would probably be arrived at, even if the legal estate in fee had been outstanding at the time of the testator's will and death, inasmuch as the Act 3 Wm. & M. c. 14, makes the devisees of an equitable estate liable for debts:

That an admission in their answer that the testator was seised of the legal estate would not estop Defendants from proving the contrary:

Held also (reversing decree of *Kindersley*, V.C.), that payment within twenty years of interest on the £3000 by *H. & T.* was not sufficient, under s. 5 of the *Statute of Limitations*, 3 & 4 Will. 4, c. 42, to prevent that statute from being pleaded in bar by the equitable tenant for life, *T. E.*
COOPE *v.* CRESSWELL 112

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COVENANT RUNNING WITH LAND—*Notice—Waiver—Covenants by Several—Parties.*] Each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood as to what should be done in the garden attached to each house:—

Held, that whether the covenants did or did not run with the land, a purchaser of one of the houses, with notice of the covenants, would be bound by them in equity.

Whether the covenants ran with the land, *quære.*

Injunction granted at the suit of the owner of one of the houses, restraining a breach of the covenants by the owner of another house, notwithstanding that small breaches of the covenants by other owners had not been interfered with, and that he himself had committed a small breach.

Held, also, that the other owners of houses were not necessary parties to a suit by one to restrain a breach of the covenants.

Decree of the Master of the Rolls affirmed.

WESTERN *v.* MACDERMOTT 72

COVENANT TO SETTLE *Property of given Value—Mode of estimating Value.*] A marriage settlement contained a covenant, that if the wife then was, or should at any time during the coverture become, entitled to any real or personal property of the value of £400, for any estate or interest whatsoever, it should be settled upon certain trusts. At the date of the settlement, the wife was entitled, on the death of her mother, to a share in a sum of stock in her own right, and a further share as one of the next of kin of a deceased brother. The value of the two shares taken together was above £400, but the value of the wife's reversionary interest in them at the date of the settlement was much less than £400. On the death of the mother, the husband and wife presented a petition to have the two shares paid to the husband:—

Held, first, that the share in the trust fund was included in the first part of the covenant, as property to which the wife was entitled at the time of her marriage:

Secondly, that the covenant referred to the value of the property, not to the value of the wife's reversionary interest in it:

Thirdly, that, in estimating the value of the share, the aggregate value of the two sums must be taken, and not the value of each sum separately.

Order of the Master of the Rolls affirmed.

In re MACKENZIE'S SETTLEMENT 345

CREDIT, LETTER OF—Indorsement of bills under letter of credit .. 391

See OPEN LETTER OF CREDIT.

CREDITOR HOLDING SECURITY—*Insolvency—Laches.*] *B.* became insolvent in 1827. His mother held a security on a contingent interest of his expectant on her death, which interest would fail if he died in her lifetime. She did not prove in the insolvency, but retained her security, and the assignee sold the equity of redemption, which was purchased by a trustee for persons of whom the mother was one. In 1857 *B.* died in his mother's lifetime, so that the security failed. The mother died in 1864, and in 1866, further assets having unexpectedly come in, the personal representative of the mother claimed to prove, and the proof was admitted by the Commissioner:—

Held, that the proof had been rightly admitted.

Ex parte PEAKE. *In re* BRODIE 453

CREDITORS, SEPARATE, *Composition with—Bankruptcy Act*, 1861, *s.* 192.] A person who carried on business in partnership executed a composition deed for the benefit of his separate creditors only, which

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was assented to by the requisite statutory majority of separate creditors. The firm was also indebted:—

Held, that the deed was not binding on a dissenting separate creditor, for that a deed providing for one class of creditors only is not within s. 192 of the *Bankruptcy Act*, 1861.

Ex parte GLEN. *In re* GLEN 670

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DAMAGES, on contract to allot shares—*Cairns' Act* 77
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DEBENTURE HOLDER—*Railway Company—Charge on "the Undertaking"—Surplus Lands—Mortgage to Contractors—Receiver—Manager—Companies Clauses Act, Schedule C.*] A mortgage debenture made by a railway company in the form given in Schedule C. of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or *interim* rents.

The "undertaking" of a railway company, which is pledged in such a mortgage, is the going concern created by the Act, which cannot be broken up or interfered with by the mortgagee; the "sums of money" are moneys *ejusdem generis* as the tolls, and are the earnings of the undertaking, which may be made available to satisfy the mortgage.

A railway company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works.

The Court will not appoint a manager of a railway.

The decision of *Stuart*, V.C., reversed.

GARDNER *v.* LONDON, CHATHAM, AND DOVER RAILWAY COMPANY (No. 1). DRAWBRIDGE *v.* SAME. GARDNER *v.* SAME (No. 2). IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* SAME 201

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See TRADING UPON FICTITIOUS CAPITAL.

DECISION OF LAW OFFICER as to patent 341, 343
See SEALING OF PATENT. 1, 2.

DEFAULT *of Railway Company in payment of Purchase-money—Injunction—Receiver—Payment into Court.*] A railway company, by agreement with a landowner, were let into possession of land which they required for part of their line, and made their railway over it, giving a bond for payment of the purchase-money on a future day. Default was made in payment of the bond :—

Held, that the landowner was not entitled to an injunction to restrain the company from continuing in possession until the purchase-money was paid.

Whether the landowner might not be entitled to a receiver, or to have the purchase-money paid into Court—*Quære.*

Order of the Master of the Rolls affirmed.

PELL *v.* NORTHAMPTON AND BANBURY JUNCTION RAILWAY COMPANY 100

DEFAULT OF COMPANY *as to Register—Jurisdiction under Companies Act*, 1862, *s.* 35—*Rectification of Register—Vendor and Purchaser—Specific Performance—Contributory.*] *W.*, a registered holder of shares, sold them to *S.*, and executed a transfer to him, which *S.* did not register. *S.* afterwards agreed to make over these shares to *H.*, and then refused to execute a transfer. *H.* thereupon persuaded *W.* to execute a fresh transfer direct to him, which *H.* took in for registration; but the directors, in consequence of a notice from *S.*, refused to register it. *H.* then filed a bill for specific performance against *S.* *S.* put in an answer stating the transfer from *W.* to *H.*, and his own willingness to concur in vesting the shares in *H.* in any way not involving his becoming a shareholder himself. Four days after this a petition for winding up was presented, upon which an order was made, *W.* being still the registered holder. The Master of the Rolls decided that the register ought to be rectified, and *H.* placed on the list of contributories instead of *W.* :—

Held, by *Turner*, L.J., that the jurisdiction given by the 35th section to rectify the register is general, and not confined to cases where there has been error, mistake, or default on the part of the company, but that the Court has a discretion whether it will exercise the jurisdiction, and that, in circumstances such as those of the present case, it ought not to be exercised :

Held, by Lord *Cairns*, L.J., that the jurisdiction given by the 35th section is confined to cases where the register is incorrect through default on the part of the company, and that as in the present case there had been no such default, the Court had no authority to rectify the register.

In re LONDON, HAMBURGH, AND CONTINENTAL EXCHANGE BANK. WARD AND HENRY'S CASE 431

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See TRANSFER TO ESCAPE LIABILITY.

DISCHARGE *after Arrangement with Creditors—Final Examination—Bankruptcy Act*, 1861, s. 110.] Where a bankrupt who has made an arrangement with his creditors under the 110th section of the *Bankruptcy Act*, 1861, applies for his discharge, it is not necessary that he should conform to all the formalities of the final examination; it is sufficient if he renders a full discovery of his property. And *semble*, such discovery may be dispensed with in cases where the terms of the arrangement render it unnecessary.
Ex parte TILSTON. *In re* TILSTON 199

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EXAMINATION *of Compounding Debtor—Bankruptcy Act*, 1861, *ss.* 192, 197—*Composition Deed.*] Sections 192, 197, of the *Bankruptcy Act*, 1861, extend to composition deeds not containing any assignment for the benefit of the creditors.

Under sect. 197, a creditor who has assented to a composition deed may have the debtor examined, for the purpose of obtaining evidence to impeach the deed.

Ex parte FACHIRI. *In re* FACHIRI 368

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———— of witnesses in *Scotland* 571
See EXAMINATION IN SCOTCH COURT.

EXAMINATION IN SCOTCH COURT *of Witnesses in English Suit—22 Vict. c. 20—Bill to perpetuate Testimony.*] Where application is made to a Scotch Court, under the 22 Vict. c. 20, to enforce the attendance of witnesses in an English suit for examination in *Scotland* before a special examiner appointed in the English suit, it is the duty of the Scotch Court to determine what witnesses are to be summoned, and what documents they are to produce, as well as to decide all questions as to privilege on the evidence which may arise on the examination.

CAMPBELL *v.* ATTORNEY-GENERAL 571

EXAMINATION OF WITNESS *on Appeal—Oral Evidence—Chancery Improvement Act*, *s.* 39—15 *&* 16 *Vict. c.* 86.] In a case where, under the old practice, the Court would have directed at the hearing an inquiry or issue on a doubtful question of fact, the Court may now examine a party or a witness *vivâ voce* at the hearing under the 39th section of the 15 & 16 Vict. c. 86.

Whether that section applies to a person not a party who has not been a witness in a previous stage of the proceedings. *Quære.*

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EXPECTATION OF PAYMENT, Contracting debt without 195
See TRADING UPON FICTITIOUS CAPITAL.

EXTRADITION—6 *&* 7 *Vict. c.* 75—29 *&* 30 *Vict. c.* 121—*Warrant—Evidence—Forms—Condemnation par Contumace.*] Copies of depositions taken before the passing of the Act 29 & 30 Vict. c. 121, if authenticated as required by the Act, may be received in evidence in proceedings under the Extradition Acts.

The original depositions, properly authenticated, can be received in evidence against the prisoner.

A French warrant for the apprehension of an accused person is necessary in order to procure his extradition under 6 & 7 Vict. c. 75, but it need not be signed by a Judge or competent magistrate, and

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need only be authenticated as made in such manner as would justify the arrest of the accused person in *France*.

A person condemned *par contumace* in *France* continues to be an accused person, liable to be delivered over under the Extradition Acts.

In re COPPIN 47

EXTRAORDINARY RESOLUTION—*Company—Voluntary Winding-up—Notices, Form of—Companies Act*, 1862, *ss.* 51, 129.] Notice was given of an extraordinary meeting of shareholders in a company, "for the purpose of considering, and, if so determined on, of passing, a resolution to wind up the company voluntarily." The meeting passed a resolution "that it had been proved to the satisfaction of the company that the company could not, by reason of its liabilities, continue its business; and that it was advisable to wind up the same." No meeting was ever called to confirm this resolution:—

Held (reversing the decision of the Master of the Rolls), that this resolution was invalid as an extraordinary resolution under the *Companies Act*, 1862, s. 129, the notice not shewing that it was intended to propose a resolution that the company was unable, by reason of its liabilities, to continue its business, nor containing anything to shew that it was proposed to pass such a resolution for winding up the company as would not require confirmation by a subsequent meeting.

In re BRIDPORT OLD BREWERY COMPANY 191

FAMILY ARRANGEMENT—*Consideration.*] *A.* died in 1831, possessed of real estates of socage, gavelkind, and borough English tenure, and also of leaseholds, stock in trade, and other personal property, leaving a wife and two sons. He made a will by which, after certain provisions for his wife, he gave all his property to his two sons equally; but this will was not admitted to probate, being incomplete. At an interview between the brothers shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, and that the property should be "not mine or thine, but ours." No agreement in writing was made, but for twenty years after the death of *A.* the two sons carried on the partnership together, and dealt with the whole property, real and personal, as if it belonged to them equally, and the widow never insisted on her rights in her husband's property. In 1851 the partnership was dissolved. The younger brother having died, his representative filed a bill for the equal division of the property:—

Held (affirming the decree of *Kindersley*, V.C.), that there was sufficient evidence of a family arrangement which the Court would uphold, although there was no formal contract between the parties.

A family arrangement may be such as the Court will uphold, although there are no rights in dispute; and if sufficient motive for the arrangement is proved, the Court will not consider the *quantum* of the consideration.

Per Lord *Chelmsford*, L.C.:—Whether the younger brother had not acquired a title at law to a moiety of the socage estates by possession for more than twenty years—*Quære.*

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See DISCHARGE.

FOREIGN LAW—Ship—Mortgage—Sale 282
See FOREIGN SHIP.

FOREIGN SHIP, *Mortgage of—Registry—Indorsement—Purchaser—Notice—Concealment.*] Certain shipbuilders in *America* built several ships, mortgaged them there, sent them to *England* for sale, sold them there, and paid the mortgagees in *America*. The mortgages were duly registered in *America;* but notice of the mortgage having been indorsed on the certificate of registry in one case, and having impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over and sold; the shipbuilders received the purchase-money, and failed, leaving the mortgagee unpaid. The mortgagee filed his bill to establish his claim against the purchaser:—

Held, that the rights to the ship acquired under *American* law must be recognised; but that the purchase, having taken place in this country, must be governed by *English* law:

That a ship is not like an ordinary chattel, which passes by delivery, and that there is no market overt for ships:

That the purchaser of a foreign ship is bound to make inquiries as to the title:

That in this case the mortgagee had so acted as to suppress the mortgage, and to make the shipbuilders his agents for the sale, and that he could not maintain his claim against the purchaser.

Decree of *Wood*, V.C., reversed.

HOOPER *v.* GUMM. McLELLAN *v.* GUMM 282

FOREIGN STATE—*Right to sue alone in Corporate Name—Jurisdiction—Corporate Plaintiff—Pleading—Cross Bill—Discovery.*] A foreign sovereign state adopting the republican form of government, and recognised by the government of Her Majesty, can sue in the Courts of Her Majesty in its own name so recognised.

Such a state is not bound to sue in the name of any officer of the government, or to join as co-Plaintiff any such officer on whom process may be served, and who may be called upon to give discovery upon a cross bill.

Per LORD CHANCELLOR and LORD CAIRNS, L.J.:—The Court may stay proceedings in the original suit, until the means of discovery are secured in the cross suit.

Columbian Government v. *Rothschild* (1 Sim. 94) distinguished.

Order of *Wood*, V.C., reversed.

UNITED STATES OF AMERICA *v.* WAGNER 582

FORFEITURE—Subdivision of shares 714
See SUBDIVISION OF SHARES.

FORFEITURE OF SHARES—*Formalities—Notice—Winding-up—Contributory.*] The articles of association of a company provided that if a shareholder should fail in paying any call, the company might give him notice that in default of payment within a specified time his shares would be forfeited; that if the requisitions of any such notice were not complied with, the shares might be forfeited by a resolution of the directors to that effect; that when any share had been so forfeited, notice of such forfeiture should be given to such shareholder, and an entry should be forthwith made in the register of shareholders, stating the date of such forfeiture; and that any share so forfeited should become the property of the company.

K., a shareholder in the company, made default in payment of his calls, and notice was sent to him in due form that, unless he paid the calls by the 2nd of September, they would be forfeited. The time

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having elapsed without payment, the secretary made entries in the books on the 3rd of September that the shares were forfeited, and had been transferred to the company. But there was no entry in the minutes of any resolution having been passed by the directors, nor any evidence of any notice of the forfeiture having been sent to *K.*:—

Held (reversing the decision of the Vice-Warden of the Stannaries' Court), that there was a valid forfeiture of the shares, and that *K.* could not be placed on the list of contributories as a member of the company.

As the entry of forfeiture on the books could not have been properly made without a resolution of the directors, the Court was bound to assume that such a resolution had been passed:

Held, also, that the forfeiture was complete on the 3rd of September, without sending a notice of it to the shareholders, the provisions in the articles as to sending the notice being mandatory only, and not of the essence of the forfeiture.

In re North Hallenbeagle Mining Company. Knight's Case 321

FOULING STREAM—Prescriptive Right—Change of nuisance .. 790

See Change of Nuisance.

————————, Prescription—Suspension—Abandonment .. 478

See Riparian Proprietors.

FRAUD *upon Act of Parliament—Colourable Sale—Purchase under Act of Parliament—Sanction of Court of Chancery—Parliamentary Entail—Restraint on Alienation—Recital in Act, when a Confirmation.*] Certain parts of estates which, by an Act of 1719, were entailed on the Earls of *Shrewsbury*, with a proviso prohibiting alienation, were, by an Act of 1803, vested in trustees in trust for sale. The moneys were to be paid into the Court of Chancery, and to be invested under the direction of the Court in the purchase of land to be settled to the same uses and subject to the same restraint on alienation as the rest of the estates. In 1824, Earl *C.*, the then Earl, entered into an agreement with the trustees to sell them estates worth about £90,000 for £1000 out of the fund in Court. The sanction of the Court of Chancery was obtained, and the transaction was completed in 1834 under the direction of the Court by Earl *J.*, the next Earl, who conveyed the estates to the uses declared by the Act of 1719, along with about £40,000 worth of lands not included in the agreement. Earl *B.*, the next Earl, disentailed all the lands which he had power to disentail, and died leaving a will by which he devised them to the Plaintiffs, who filed their bill to recover them from the present Earl:—

Held, affirming the view of the Master of the Rolls on this point, that the Court of Chancery had jurisdiction, for that the Plaintiffs, assuming them to have a legal title, were in equity entitled to recover only on the terms of restoring the £1000, which was a lien on the estates; and that, moreover, the circumstances that the conveyance of 1832 appeared on the face of it to be regular, and to be made under the direction of the Court of Chancery, would embarrass the Plaintiffs in proceeding at law:—

Held, reversing the decision of the Master of the Rolls, that the Plaintiffs were entitled to recover the estates, for that the Act of 1803 only authorized estates which were *bonâ fide* purchased to be brought within the restraint on alienation, that the transaction of 1832 was a gift under colour of a sale, and that the settlement then made was a voluntary settlement to which the parliamentary restraint on alienation did not attach, and that the disentailing assurance and devise by Earl *B.* effectually passed the fee in them to the Plaintiffs.

Howard *v.* Earl of Shrewsbury 760

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FRAUD, Interest in absence of 488
See INTEREST ON BALANCES

——— on power of lessor 158
See OBSTRUCTION OF VIEW.

FRAUDULENT ASSIGNMENT, Estoppel of petitioning creditor as to . 374
See PETITIONING CREDITOR.

FRAUDULENT DEVISES, Statute of, s. 3—Remedy against heir and devisees in trust 112
See COVENANT.

GENERAL MEETING, *Sanction of—Voluntary Winding-up—Compromise—Companies Act*, 1862, *s.* 159.] A claim made against a company which was in course of voluntary winding up, was submitted to the Court for adjudication. After some proceedings towards obtaining such adjudication had taken place, an agreement for compromise was come to between the claimant and the liquidator, subject to the sanction of a general meeting. A general meeting, under sect. 159 of the Act, sanctioned the compromise by a large majority; but some contributories strongly opposing its being carried into effect, the liquidator applied to the Court for directions. The Master of the Rolls was of opinion that although the compromise had been sanctioned by the general meeting, the Court was bound to look to its propriety, and his Lordship, not being satisfied of its propriety, refused to make any order:—

Held, that as the Court, although the winding-up was purely voluntary, had seisin of this particular claim, it would not, without considering the propriety of the compromise, order it to be carried into effect because it had been sanctioned by a general meeting, but that such sanction was an important element in judging of its propriety.

Per ROLT, L.J.:—The sanction of a general meeting is sufficient to throw on the parties objecting to the compromise the onus of shewing that it is unreasonable.

In re LAMA COAL COMPANY. *Ex parte* MILLER 692

GENERAL ORDER OF 5TH FEBRUARY, 1861, RULE 6 701
See WITNESSES.

GENERAL ORDER IN BANKRUPTCY of 22nd May—Affidavit .. 330
See AFFIDAVIT.

GENERAL SHIP—Stoppage in transitu 332
See STOPPAGE IN TRANSITU.

GIFT UNDER COLOUR OF SALE, Setting aside 760
See FRAUD.

GRAMMAR SCHOOL—*Gratuitous Education—Mixture of Paying and Free Scholars—Competitive Examination.*] A grammar school was founded in 1525, for the gratuitous education of boys without any distinction of class. In 1849, a scheme was settled, providing for the education of the scholars in classics and mathematics, and also in modern languages and physical science. The income of the school having become insufficient for carrying out the scheme, the Court (affirming *Wood*, V.C.) sanctioned the admission of 100 additional boys at an annual payment, which was to be applied to the augmentation of the general funds of the school.

But the Court (differing from *Wood*, V.C.) *held*, that all the scholars, whether paying or free, should be equally considered as on the foundation, and that no distinction should be made between them with respect to exhibitions and prizes; and also that there should be no competitive examination for the free scholars on their admission.

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Observations on the benefits likely to arise from the mixture of free and paying scholars in the same school.
MANCHESTER SCHOOL CASE 497

GRATUITOUS EDUCATION—Charity 497
See GRAMMAR SCHOOL.

IMPOSSIBILITY of specific performance—Damages 77
See CONTRACT TO ALLOT SHARES.

IMPOSSIBILITY OF CARRYING ON BUSINESS — *Companies Act*, 1862, *s.* 79, *clause* 5—*Winding-up.*] The 5th head of section 79 of the *Companies Act*, 1862, is restricted to matters *ejusdem generis* with the four previous heads, and does not authorize the Court to wind up a solvent company, against the wish of the majority of shareholders because the business has been carried on at a loss, and appears likely to continue a losing concern.
Semble, nevertheless, that proof of impossibility of carrying on the contemplated business would justify a winding-up order, even in the absence of insolvency.
In re SUBURBAN HOTEL COMPANY 737

INCOME, Annuity whether payable out of corpus or 644
See ANNUITY, PAYABLE OUT OF CORPUS.

————, as between tenant for life and remainderman 751
See CONVERSION.

INCREASING NUISANCE—Fouling stream 478
See RIPARIAN PROPRIETORS.

INCUMBRANCES—Trust to pay off incumbrances, execution of .. 255
See AGREEMENT TO ACCEPT PART OF DEBT IN DISCHARGE OF THE WHOLE.

INJUNCTION—Railway company making default in payment of purchase money 100
See DEFAULT.

———— Obstruction of view of place of business 158
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INLAND REVENUE OFFICE—Certificate 155
See CERTIFICATE OF INLAND REVENUE OFFICE.

INSOLVENCY—Creditor holding security 453
See CREDITOR HOLDING SECURITY.

INTEREST ON ARREARS OF INCOME—*Executor—Delay.*] The Court will not charge an executor who has been guilty of delay in accounting, with interest on arrears of income unpaid by him.
I. was entitled to a life income from the estate of her husband, and died in 1861. A bill was filed by her executor, in 1862, against the executor of her husband's will, who had been his partner in business, for an account of income due to her estate: in 1863 accounts were directed. In 1866 a certificate was made, finding that a large sum was due from the husband's executor:—
Held, that he was not chargeable with interest before the date of the certificate.
Order of the Master of the Rolls affirmed.
BLOGG *v.* JOHNSON 225

INTEREST ON BALANCES—*Agent—Account.*] An agent had the entire management of the affairs of his principal for several years, during which he was never called upon to account; errors were then discovered in some accounts furnished by him, and he paid a small sum admitted to be due, alleging that this was a final settlement, and that

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only a small sum, if anything more, was due. On a bill being filed, and the accounts being taken, a large sum was found due from him :—

Held that, under the circumstances, fraud not being proved, he was not chargeable with interest on the balances in his hands until the date of the certificate.

Order of the Master of the Rolls affirmed.

TURNER *v.* BURKINSHAW 488

INTEREST ON LEGACY—*Will—Appointment—Trust for Payment of Legacy in futuro.*] A testatrix, having a general power of appointment over property which was the subject of pending litigation, appointed it by her will to *J. L.*, upon trust, "so soon as proceedings in law and equity should be terminated, and the same should come into his possession," to pay certain legacies, and as to the residue upon other trusts :—

Held, that the trust to pay the legacies did not arise, and consequently that the legacies did not carry interest until the litigation ended and the property came into the hands of *J. L.*, which was not until more than eighteen years after the death of the testatrix.

Wood v. *Penoyre* (13 Ves. 325) distinguished.

LORD *v.* LORD 782

———— Accounts on dissolution of partnership 250

See ACCOUNTS.

INVESTMENTS authorized and unauthorized—Adjustment of accounts . 751

See CONVERSION.

JOINT STOCK COMPANIES ACT, 1856, s. 11—Jurisdiction to recover assets after winding-up 405

See ASSETS.

JUDGMENT CREDITOR—*Sale under* 27 & 28 *Vict. c.* 112, *s.* 4—*Railway Company—Saleable Interest.*] Where it is not clear that a debtor has any saleable interest in land taken in execution by his judgment creditor, the Court will not order an immediate sale, under 27 & 28 Vict. c. 112, s. 4, but will direct inquiries as to the nature of the debtor's interest.

Semble, that the interest of a railway company in its railway is not saleable under that section.

In re BISHOP'S WALTHAM RAILWAY COMPANY 382

2. ———— ———— *Sale under* 27 & 28 *Vict. c.* 112, *s.* 4—*Railway Company—Surplus Lands.*] Form of order on Petition by a judgment creditor for sale of surplus lands of a railway company under 27 & 28 Vict. c. 112, s. 4.

GARDNER *v.* LONDON CHATHAM AND DOVER RAILWAY COMPANY.

Ex parte GRISSELL 385

JURISDICTION TO MAKE ORDERS *under* 15 & 16 *Vict. c.* 86.] Where the practice of the Court is regulated by 15 & 16 Vict. c. 86, any order of Court purporting to alter it must be made with the advice and assistance of three other Judges, and cannot be made by the Lord Chancellor alone.

SHORT *v.* ROBERTS 13

JURISDICTION to recover assets of wound-up company 405

See ASSETS.

———— under Companies Act, 1862, s. 35 431

See DEFAULT OF COMPANY.

JURISDICTION OF SINGLE LORD JUSTICE.] Decrees made on motion for decree may, under 30 & 31 Vict. c. 64, be reheard by a single Lord Justice.

BAXENDALE *v.* MCMURRAY 790

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JURISDICTION of Charity Commissioners—Charity administered abroad 356
See CHARITY ABROAD.

——— of Scotch Court on examination of witnesses in *Scotland* 571
See EXAMINATION IN SCOTCH COURT.

——— as to setting aside sale sanctioned by Court 760
See FRAUD.

——— after suspension of bankruptcy 556
See RESOLUTION SUSPENDING BANKRUPTCY.

——— Restraint of application to Parliament 237
See RESTRAINT OF APPLICATION TO PARLIAMENT.

——— of Stannaries Court 398
See STANNARIES COURT.

——— under Companies Act, 1862, s. 35 685
See TRANSFER TO ESCAPE LIABILITY.

KNOWLEDGE of directors when notice to company 617
See NEGOTIABLE SECURITIES.

LACHES OF CONTRIBUTORY—*Company—Winding-up.*] A person allowing his name to remain for a length of time on the list of contributories of a company without making any objection, does not raise an equity against his applying to have it removed, where no loss is sustained by the estate which would have been avoided if the application had been made earlier. Whether, even in the case of such loss being sustained, any such equity would arise, *quære.*

Order of the Master of the Rolls reversed.

In re MEXICAN AND SOUTH AMERICAN COMPANY. SHEWELL'S CASE 387

——— Annulling adjudication 363
See ANNULLING ADJUDICATION.

——— of creditor holding security 453
See CREDITOR HOLDING SECURITY.

——— Misrepresentation in prospectus 604
See MISREPRESENTATION IN PROSPECTUS.

——— Rectification for variance 412, 536, 674
See VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM. 1, 2, 3.

LAND DRAINAGE COMPANY—12 & 13 *Vict. c.* xci.—*Agent—Profit.*] The practice of *The Land Drainage Company* under their Act, of making contracts in which the agent for the landowner contracts to execute the drainage works as agent and surveyor for the company, the landowner finding money for the purpose, and being paid an agreed amount by the company, condemned.

In such a case, notwithstanding the apparent terms of the contract, it may be shewn that the agent was not the real contractor, and is not entitled to any profit on the contract.

Decree of *Stuart*, V.C., varied.

WATERS *v* EARL OF SHAFTESBURY 231

LEASE, Power in 158
See OBSTRUCTION OF VIEW.

——— Option to take 67
See OPTION TO TAKE LEASE

LEAVE TO ISSUE EXECUTION—*Composition Deed—Dissentient Creditor—Bankruptcy Act*, 1861, *s.* 198.] Where a debtor has

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executed a trust deed under the 192nd section of the *Bankruptcy Act*, 1861, and it has been duly registered, a creditor who has not executed it is equitably in the same position as those who have; and although the deed contains no release of the debtor, the Court will refuse to give leave to such a creditor, under the 198th section, to issue execution, unless he shews some special grounds.
Ex parte THATCHER. *In re* THATCHER 93

LEGACY, Interest on future 782
See INTEREST ON LEGACY.

LEGACY OR SUCCESSION DUTY—Certificate 155
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LESSEE, Option of, exercised after expiration of term 67
See OPTION TO TAKE LEASE.

————, Option of, passing to assignee 67
See OPTION TO TAKE LEASE.

LESSOR, Power of, exercised with collateral object 158
See OBSTRUCTION OF VIEW.

LETTER OF CREDIT—Indorsement of bills under 391
See OPEN LETTER OF CREDIT.

LETTERS, Production of private 447
See PROPERTY IN LETTERS.

LIEN OF SOLICITOR—Bankruptcy—Creditors' Deed 808
See SOLICITOR'S LIEN.

LIMITATIONS, STATUTE OF—Payment of interest by party liable .. 112
See COVENANT.

———————————— Possession of partner 294
See FAMILY ARRANGEMENT.

———————————— Suspension of, when debtor administers to creditor—Cutting timber 628
See TIMBER.

LIQUIDATOR—Discovery from 350
See PRODUCTION OF DOCUMENTS.

LIS PENDENS, *Registration of winding-up Petition as—Companies Act*, 1862, *s.* 114.] The 114th section of the *Companies Act*, 1862, does not authorize the registration of a Petition for winding up a company as a *lis pendens* against the individual contributories.
Order of the Master of the Rolls reversed.
In re BARNED'S BANKING COMPANY. *Ex parte* THORNTON .. 171

MANAGER—Debenture holder not entitled to 201
See DEBENTURE HOLDER.

MARRIAGE SETTLEMENT—Covenant to settle future property .. 345
See COVENANT TO SETTLE.

MEETING—Sanction of compromise 692
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MEMORANDUM, Effect of signing 427
See SIGNING MEMORANDUM.

MERGER of term 13
See "PERSONAL PROPERTY, ESTATE, AND EFFECTS."

MISREPRESENTATION—Conditions of sale 102
See CONDITIONS OF SALE.

———————————— Particulars of sale 21
See PUFFING.

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MISREPRESENTATION IN PROSPECTUS—*Laches—Contributory.*] *S.*, on the day of registration of a company for working mines in *N.*, received a prospectus issued by the company which stated that they had agreed to purchase a property in *N.*, containing valuable claims, some of which were in full operation, and making large daily returns. *S.*, on the faith of this, took shares, and was registered as shareholder on the 2nd of August, 1865. On the 30th of December, 1865, up to which time he had heard nothing to throw doubt on the prospectus, he received a report from the company, shewing that the company had found the property worthless, and had agreed to purchase another instead, and promising a detailed report in a short time. On the 19th of January, 1866, *S.* received the detailed report, shewing that the property was worthless, and that the workings on it had been abandoned before the prospectus was issued. The directors, as it appeared, had issued the prospectus on the faith of the representations of the vendor of the property, and without knowing of their untruth. On the 6th of February, 1866, *S.* filed a bill to be relieved from his shares. On the 28th of May, 1866, a winding-up order was made, and *S.*, who had been refused leave to prosecute the suit, applied under the winding-up to have his name removed from the list of contributories:—

Held, in accordance with the opinion of the Master of Rolls, that *S.* had not been guilty of laches, for that the report received on the 19th of January did not shew the representations in the prospectus to have been untrue at the time when it was issued, and that *S.* was therefore right in waiting for further information before he took proceedings to get rid of his shares:—

Held, reversing the decision of the Master of the Rolls, that *S.* was entitled to have his name removed from the list of contributories.

In re Reese River Silver Mining Company. Smith's Case .. 604

MORTGAGE by railway company of proceeds of surplus lands 201
See Debenture Holder.

——— Receiver—Accounts 634
See Receiver.

MORTGAGOR AND MORTGAGEE—Receiver—Accounts 634
See Receiver.

MOTION FOR DECREE—Examination of witnesses 701
See Witnesses.

NEGOTIABLE SECURITIES, *Power of Company to issue—Companies Act*, 1862, *s.* 47—*Bills of Exchange—Notice.*] A company was formed under the *Companies Act*, 1862, for the purpose of purchasing a concession from a foreign government for the construction of a railway, and forming a *société anonyme* to make the railway. The memorandum stated that in order to attain their main object the company might do in *England*, or *Peru*, or elsewhere, whatever they thought incidental or conducive thereto. The articles gave the directors power to do all things, and make all contracts, which, in their judgment, were necessary and proper for the purpose of carrying into effect the object mentioned in the memorandum. It was decided in the Court below that bills of exchange accepted in manner prescribed by sect. 47 of the Act were binding on the company, for that every company constituted under the Act of 1862 has power to issue bills of exchange:—

Held, on appeal, that the *Companies Act*, 1862, does not confer on all companies registered under it a power of issuing negotiable instru-

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ments; but that such a power exists only where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred:

But *held*, that such a power existed in the present case; for that although it could not be inferred from the nature of the business of the company, it was conferred by the above general words in the memorandum and articles.

The Court of Appeal concurring in the conclusion of the Court below, but not in the reasons given for it, the appeal was dismissed without costs.

The knowledge of a director that bills indorsed for value to his company were bills which had been accepted for the accommodation of the drawer, the director not having been concerned on behalf of his company in the transaction in which the bills were indorsed to them, held not to affect the company with notice of the fact of their being accommodation bills.

PERUVIAN RAILWAYS COMPANY *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY. *In re* PERUVIAN RAILWAYS COMPANY 617

NEW TRIAL, *Motion for, in Patent Case—Practice—21 & 22 Vict. c. 27, s. 5—Specification—Variance—Novelty.*] When a motion for a new trial is made before the Court of Appeal, the Court will not consider whether the finding was proper, but merely whether there was sufficient evidence to warrant the verdict.

Where the motion is grounded on the improper rejection of evidence, the evidence ought to have been formerly tendered to the Judge of the Court below, and rejected by him.

PENN *v.* BIBBY 127

NOTICE of extraordinary resolution, requisitions of 191
See EXTRAORDINARY RESOLUTION.

——— Purchaser of foreign ship put on inquiry 282
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——— of forfeiture, whether necessary 321
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——— to company, when from director's knowledge 617
See NEGOTIABLE SECURITIES.

——— of exercising option 143
See OPTION OF PURCHASE.

NOTICE OF COVENANT, Effect of, on purchaser 72
See COVENANT RUNNING WITH LAND.

NOVELTY—New application of old contrivance 127
See PROVISIONAL SPECIFICATION.

NUISANCE—Change of 790
See CHANGE OF NUISANCE.

OBJECTIONS to sealing patent 341, 343
See SEALING OF PATENT. 1, 2.

OBSTRUCTION OF VIEW *of Place of Business—Injunction—Power to make Road.*] The erection of a building will not be restrained because it injures the Plaintiff by obstructing the view of his place of business.

Where a lessor had power by the lease to divert a road if he made a certain other alteration:—

Held (affirming the decree of *Kindersley*, V.C.), that he had power

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at any time to make the alteration, and divert the road, although he might have made the alteration for the purpose of entitling himself to divert the road, and that in this respect a power under a deed differs from a power conferred by Act of Parliament.

If the diversion of the road had not been authorized by the lease, but had occasioned no irreparable injury, *semble*, the Plaintiff would have been left to his remedy at law.

BUTT *v.* IMPERIAL GAS COMPANY 158

OFFICIAL LIQUIDATOR—Discovery from 350
See PRODUCTION OF DOCUMENTS.

OPEN LETTER OF CREDIT—*Bills of Exchange—Promise to accept Bills.*] A bank gave to *D. T. & Co.* a letter addressed to them, and expressed thus: "No. 394. You are hereby authorized to draw upon this bank to the extent of £15,000, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back hereof." *D. T. & Co.* drew bills under this letter to the amount of £6000, and indorsed them to the Appellant, who duly indorsed particulars on the letter of credit. The bank was afterwards ordered to be wound up, and *D. T. & Co.* were indebted to the bank to an amount exceeding what was due on the bills:—

Held (reversing the decision of *Wood*, V.C.), that whatever might be the effect of the letter of credit at law, it constituted a contract to the benefit of which all persons taking and paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank and *D. T. & Co.*, and that the Appellant was entitled to prove for the amount due on the bills, without regard to the state of the account between the bank and *D. T. & Co.*

In re AGRA AND MASTERMAN'S BANK. *Ex parte* ASIATIC BANKING CORPORATION 391

OPTION OF PURCHASE, *Exercise of—Notice—Solicitor.*] A testator gave to his children in succession an option to purchase certain property at a price to be fixed by arbitration within a prescribed time, and declared that the time to be allowed to each of his children for exercising the option was to be two calendar months, within which time he or she, in the event of purchasing, should enter into such an agreement for completion as the arbitrators should approve. The award was left, on the 5th of May, at the office of the solicitor of the trustees and the testator's family, who also acted for the eldest son. The solicitor, on the 7th, wrote to the eldest son, informing him of the price. The son, on the 16th of June, replied by letter that he elected to take the estate at the price, and went on to ask that if he had to sign any agreement it might be forwarded to him. He signed, on the 6th of July, an agreement approved by the arbitrators, and shortly after completed the purchase. The son having sold the property and filed a bill for specific performance:

Held, by the Master of the Rolls, that the title was marketable, for that the letter of the 16th of June, which was clearly sent within the two months, was a valid exercise of the option:

Held, by the Lord Chancellor, that the title was marketable, for that the two months ought to be reckoned, not from the date of the award, but from the time when it was first communicated to the son; and that thus the formal agreement was signed within the two months, and

Semble, that the option was effectually exercised by the letter of the 16th of June:

Held, also, that the son was not to be deemed to have had know-

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ledge of the award from the time when it was communicated to the solicitor.
AUSTIN *v.* TAWNEY 143

OPTION TO TAKE LEASE—*Assignee in Bankruptcy—Purchaser—Exercise after Expiration of Term — Bankruptcy Act*, 1849, *ss.* 141 . . . 147.] The owner of a long term in land agreed to let it for three years, and also, when called upon by the tenant, to grant him a lease for three years, seven years, or the whole term. The tenant continued in the occupation beyond the three years, and became bankrupt. The assignee sold the bankrupt's estate and interest in the leasehold to a purchaser:—
Held, first, that the option of the tenant to take a lease was not gone at the end of the three years:
Secondly, that it passed to the assignee in bankruptcy:
Thirdly, that the option had passed to the purchaser.
Order of the Master of the Rolls affirmed.
BUCKLAND *v.* PAPILLON 67

ORAL EVIDENCE at hearing, and on appeal 77
See EXAMINATION OF WITNESS.

ORDER, Form of, on application of judgment creditor for sale 382
See JUDGMENT CREDITOR. 1.

———, Form of, on application of judgment creditor for sale of surplus lands 385
See JUDGMENT CREDITOR, 2.

———, Consolidated, X. r. 7—Service out of the jurisdiction 32
See SERVICE OUT OF THE JURISDICTION.

——— of 5th Feb. 1861, Rule 6 701
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ORDER IN BANKRUPTCY, 22nd May, 1862—Affidavit 330
See AFFIDAVIT.

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PARTICULARS OF SALE, Misrepresentation in 21
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———, What necessary, to suit on covenant affecting several 72
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PARTNER, Proof against estate of 550
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PARTNERSHIP, Accounts on dissolution 250
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PARTY LIABLE, Payment of interest by 112
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See SEALING OF PATENT. 1, 2.

PAYMENT INTO COURT—Railway company making default in payment of purchase-money 100
See DEFAULT.

PAYMENT INTO COURT BEFORE DECREE—*Practice.*] Money will not be ordered to be brought into Court upon motion before decree, unless it appears clearly upon the answer to belong to the Plaintiff.

Where the admissions made by the answer shew the Defendant to be a trustee of money, a mere formal denial of the fact will not prevent him from being ordered upon motion to bring the money into Court.

Order of the Master of the Rolls reversed.

HAGELL *v.* CURRIE 449

PAYMENT OF PURCHASE-MONEY INTO COURT—*Vendor and Purchaser—Railway Company.*] The Plaintiff agreed to sell lands to a railway company at a sum to be paid on completion, with interest at £4 per cent. from the date of the agreement. The company were to be at liberty to take possession on making a certain deposit. If from any cause, other than default of the vendor, the purchase was not completed in six months, the interest was, from the expiration of the six months, to be at the rate of £5 per cent. The deposit was made, and possession taken. The company when pressed to complete, more than three years after the date of the agreement, alleged inability from want of funds :—

Held (affirming the decision of *Stuart*, V.C.), that the Plaintiff was not entitled to an order on motion for payment of the balance of the purchase-money into Court.

PRYSE *v.* CAMBRIAN RAILWAY COMPANY 444

PEACE, BILL OF 8, 243
See BILL OF PEACE. 1, 2.

PENALTY—Revivor of Debt 255
See AGREEMENT TO ACCEPT PART OF DEBT IN DISCHARGE OF THE WHOLE.

"PERSONAL PROPERTY, ESTATE, AND EFFECTS"—*Term in Gross or attendant—Merger.*] *A. B.* purchased the residue of a term of ninety-nine years at a ground-rent, and the term was assigned to him. In the following year he bought the freehold reversion, and, by a deed reciting that he was desirous that the term should not merge, the reversion in fee was conveyed to a trustee, subject to the term, in trust for *A. B.*, his heirs, or assigns, and to be conveyed and disposed of as he or they should direct. *A. B.* afterwards made a will, giving to his wife "the whole of my personal property estate and effects of every and whatsoever kind they may be :"—

Held, affirming the decision of the Master of the Rolls, that the gift in the will was confined to personal estate, and did not pass the reversion in fee, but that the term was a term in gross, and passed by the will as personal estate.

BELANEY *v.* BELANEY 138

PETITIONING CREDITOR *estopped by Assent to Deed—Act of Bankruptcy—Fraudulent Assignment.*] A debtor having called his creditors together, proposals were made as to a composition. The creditors insisted on an assignment of the debtor's property to trustees for their benefit. He refused to make it; but, after the meeting had broken up, he executed such an assignment. *G.*, one of his creditors, was present during the preparation of this assignment, and, though he

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denied having been present at its execution, the Court came to the conclusion that he had acquiesced in its being executed, and taken a benefit under it, by having the property protected from execution:—

Held (reversing the decision of the Commissioner), that *G.* could not avail himself of the deed as an act of bankruptcy, although it might be that he had not so far assented to it as to be bound by its provisions.

Ex parte STRAY. *In re* STRAY 374

PLAINTIFF—Foreign state suing alone in corporate name 582
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PLEADING—Bill of peace—Discretion of Court on demurrer 8
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——— Payment into Court on motion 449
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See TAKING BILL OFF THE FILE.

———— Examination of witnesses on motion for decree 701
See WITNESSES.

PRESCRIPTION—Fouling stream 478
See RIPARIAN PROPRIETORS.

PRESCRIPTIVE RIGHT, Nature of 790
See CHANGE OF NUISANCE.

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PRINCIPAL AND AGENT—Interest on balances 488
See INTEREST ON BALANCES.

PRIOR USER—Whether a ground for refusing sealing of patent .. 341
See SEALING OF PATENT. 1.

PRIORITY—Lost by conduct 282
See FOREIGN SHIP.

PRIVATE LETTERS, Production of 447
See PROPERTY IN LETTERS.

PRODUCTION OF DOCUMENTS *by Official Liquidator—Privileged Communication—Official Liquidator—Proceedings by alleged Contributory.*] In a proceeding by an alleged contributory under the winding up of a company to obtain relief from liability, the official liquidator is in the same position as if a bill had been filed against the company, and he had been made a Defendant for the purpose of discovery He is therefore bound by the same rules as to answering questions, and producing documents, and is entitled to the same privilege, as such a Defendant would be.

Order of the Master of the Rolls affirmed, but on a different ground. *In re* BARNED'S BANKING COMPANY. *Ex parte* THE CONTRACT CORPORATION 350

PROFIT made by agent 231
See LAND DRAINAGE COMPANY.

PROFITS—Accounts of partnership 250
See ACCOUNTS.

PROMISE TO ACCEPT BILLS—Indorsement of bills under letter of credit 391
See OPEN LETTER OF CREDIT.

PROOF BY FIRM *against Estate of Partner—Dealings between Trade and Trade—Partner competing with his own Creditors.*] *B.*, a banker at *Torrington*, entered into partnership with *M.*, a merchant in *London*, and *P.*, a merchant in *India*, as merchants, under the firm of *M. & Co.*, and by the partnership deed *B.* and *M.* mutually covenanted to bring £6500 each into the business. There was also a subsidiary agreement that *B.* should accept bills for the firm at a commission, and that the firm should negotiate them, and keep *B.* in

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funds to meet the acceptances. *B.* became bankrupt, and *M.* and *P.* executed deeds of arrangement with their creditors.

M., on behalf of the firm of *M. & Co.*, claimed to prove in *B.'s* bankruptcy for a sum of £5082 due from him to the firm on their current account, and for £2773 due from *B.* to *M.* on the covenant in the deed for capital not brought in by *B.*:—

Held (affirming the decision of the Commissioner), first, that the transactions between *B.* and *M. & Co.* were not dealings between trade and trade so as to take the case out of the rule against a firm proving a debt against the estate of one of the partners; and that the fact of all the partners being insolvent, and therefore having no personal interest, did not prevent the application of the rule against a partner competing with his own creditors; secondly, that the sum due on the covenant being due on account of the partnership, it could not be proved by one partner against the estate of his co-partner without first taking the accounts of the partnership.

Ex parte MAUDE. *In re* BRAGINTON 550

PROOF OF INSOLVENCY by creditor holding security 453
See CREDITOR HOLDING SECURITY.

PROPERTY IN LETTERS—*Production of Documents—Confidential Letters from a Stranger.*] A Defendant cannot refuse to produce private and confidential letters from a stranger on the ground that the writer forbids their production. But the Plaintiff will be put upon an undertaking not to use them for any collateral object.

Decision of the Master of the Rolls reversed.

HOPKINSON *v.* LORD BURGHLEY 447

PROSECUTION of accomplices of bankrupt, Costs of 493
See COSTS OF PROSECUTION.

PROSPECTUS, Misrepresentation in—Laches 604
See MISREPRESENTATION IN PROSPECTUS.

PROVISIONAL SPECIFICATION—*Generality—Variance of complete Specification.*] A provisional specification, if allowed by the law officer of the Crown, cannot be impeached as being too general.

The complete specification must not claim anything different from that which is included in the provisional specification, but need not extend to everything so included.

The new application of any means or contrivance may be the subject of a patent, if it lies so much out of the track of the former use as not naturally to suggest itself, but to require some application of thought and study.

PENN *v.* BIBBY 127

PUBLIC CONVENIENCE—*Defence by Railway Company to Specific Performance—Injunction.*] The Plaintiff, a landowner, had withdrawn his opposition to a railway bill in consideration of the company agreeing to make a road and an approach in a particular manner. The company altered the level of their line, and varied the course and inclination of the road. The bill was filed pending the works, and a motion for injunction had been ordered to stand to the hearing, on the company undertaking to abide by the direction of the Court as to altering their works. The railway had since been opened for traffic:—

Held (reversing the decree of the Master of the Rolls), that the Plaintiff was entitled to specific performance, and that the company could not set up the inconvenience to the public by the interference with the traffic as a reason for not performing their agreement.

RAPHAEL *v.* THAMES VALLEY RAILWAY COMPANY 147

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PUFFING—*Sale without Reserve—Particulars of Sale—Misrepresentation.*] An estate being sold by the Court at the suit of a mortgagee, with liberty to all parties to bid, the auctioneer stated in the sale-room that the sale was without reserve, but that the parties were at liberty to bid. The Plaintiff bid at the sale, and ran the purchaser up from £14,000 to £19,000, without any other bidder intervening:—

Held, that the purchaser was not entitled on this ground to be discharged.

The particulars of sale described a farm, forming about a third of the estate sold, as late in the occupation of *A. B.*, at the rent of £290. *A. B.* had occupied the farm, which contained a good deal of grass land, as yearly tenant, at £290, but went in at Midsummer, paying only £1 for the first quarter, and quitted at Michaelmas in the next year, thus paying £291 for a year and a quarter. Since this the Plaintiff had agreed to let the farm at £225; but the agreement had been rescinded before taking possession, and the evidence shewed that the farm would not let for nearly so much as £290:—

Held, reversing the order of *Stuart*, V.C., that there was such substantial misrepresentation as entitled the purchaser to be discharged.

DIMMOCK *v.* HALLETT 21

PURCHASE-MONEY — Default of railway company — Injunction — Receiver—Payment into Court 100

See DEFAULT.

——————— Payment into Court 444

See PAYMENT OF PURCHASE-MONEY INTO COURT.

PURCHASER, Option of lessee passing to 67

See OPTION TO TAKE LEASE.

PURCHASER'S SHIP—Stoppage *in transitu* 332

See STOPPAGE IN TRANSITU.

QUALIFIED ACCEPTANCE *of Shares — Company — Contributory—Agreement to take Shares, and to set off Calls in Payment for Goods.*] In July, 1863, *E.* applied for 150 £10 shares in a company on the faith of an agreement with a promoter (subsequently ratified), that he should only pay 30*s.* per share in cash, and that the further calls should be set off against goods. *E.* paid a deposit of 10*s.* per share, and the shares were allotted to him in August, when he paid the further sum of 20*s.* per share. He received the certificates, and was entered on the register. No goods were ordered, and the company having been ordered to be wound up:—

Held (reversing the decision of *Wood*, V.C.), that *E.* must be on the list of contributories.

Whether he could not sustain a claim against the company to be indemnified against the calls, under the collateral contract to take shares only in payment for goods supplied, *quære.*

In re RICHMOND HILL HOTEL COMPANY. ELKINGTON'S CASE .. 511

2. ——————— *of Shares — Company — Contributory—Agreement to take Shares, and to set off Calls in Payment for Goods.*] In July, 1863, *P.* applied for fifty £10 shares in a company on the faith of an agreement with a director that he should receive orders for goods to the extent of at least £1000; that he should only pay 30*s.* per share in cash, and that the calls for the rest should be set off against the goods. He paid, on application, a deposit of 10*s.* per share. The agreement was, with an additional term, ratified by the board of directors in November, 1863. In December, 1863, *P.* wrote to the company, declining to proceed further in the matter. In July, 1864,

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the secretary wrote to *P.*, requiring him to pay £3 10*s.* per share for calls. No letter of allotment had ever been sent to *P.*, but he had been put on the register. In November, 1866, an order was made for winding up the company:—

Held (affirming the decision of *Wood*, V.C.), that *P.* was not a contributory, for that he had only agreed to take shares upon the conditions of the special agreement as to set-off, which, if *ultrà vires* of the directors, was not binding on the company, and therefore, for want of mutuality, not binding on *P.*; and, if *intrà vires*, was still not enforceable against *P.*, because the stipulations on the part of the company had become incapable of being performed.

An agreement that the calls payable by a tradesman who is a shareholder in a company shall not be payable in cash, but only by set-off against goods supplied by him, is in general *ultrà vires*.

Per Lord *Cairns*, L.J.:—Where a person applies for shares in a company, there is in general no binding contract to take shares until the company have communicated to him an allotment of shares; the decision in *Bloxam's Case* (33 Beav. 529; 12 W. R. 995) being referable to its special circumstances.

In re RICHMOND HILL HOTEL COMPANY. PELLATT'S CASE .. 527

QUARRIES—Trading by bankrupt 466
See TRADING.

RAILWAY COMPANY—Debenture not a charge on surplus lands—Manager 201
See DEBENTURE HOLDER.

——————— Default in payment of purchase-money—Injunction 100
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——————— Sale of surplus lands to satisfy judgment .. 385
See JUDGMENT CREDITOR. 2.

——————— Payment into Court 444
See PAYMENT OF PURCHASE-MONEY INTO COURT.

——————— Public convenience as a defence to specific performance 147
See PUBLIC CONVENIENCE.

"RASH AND HAZARDOUS SPECUALTION" — *Bankruptcy Act*, 1861, *s.* 159.] A merchant, at the end of 1865, held invoices for 800 bales of cotton, of the value of £29,000, for which he had accepted bills. At that time he knew himself to be, if not insolvent, at all events in a critical position, having nothing but the cotton to meet the bills. He stopped payment in June, 1866, and became bankrupt, having in the meantime given or confirmed orders for 1100 more bales of cotton, of the value of £35,000. He had scarcely any assets besides his cotton, which was pledged beyond its value, and his unsecured debts were £58,000:—

Held, that although dealing in cotton was within the limits of legitimate commerce, still, as such dealing was notoriously hazardous, the bankrupt, having regard to the state of his affairs at the end of 1865, was bound to exercise the greatest caution as to extending his liabilities for cotton, and that the subsequent orders for the 1100 bales, which appeared not to have been requisite for keeping his business

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together, must be considered as having been given in order to take the chance of a rise in price, with a certainty that the loss, in case of a fall, would have to be borne by his creditors, and that this was "rash and hazardous speculation."

An order of the Commissioner, suspending the order of discharge for twelve months, and for six months of that period without protection, was accordingly affirmed.

Ex parte HEYN. *In re* HEYN 650

RECEIVER *under Mortgage—Mortgagor and Mortgagee—Receipt of Rents.*] A first mortgage was made to secure a principal sum, with interest at £5 per cent., and was accompanied by a receivership deed in the common form. A subsequent mortgage was made to *M.*, containing a stipulation that if the interest should be in arrear forty days, the receiver under the former deed should act, and should stand possessed of the rents, after payment of interest on the first mortgage, in trust to pay the interest on *M.*'s mortgage, and pay the ultimate surplus to the mortgagor. The first mortgagees and the receiver had notice of this deed. By a subsequent deed the property was charged, in favour of the first mortgagees, with an extra £1 per cent. interest on the sum secured by the first mortgage. The receiver at times took possession at the instance of the first mortgagees, and from the date of the last-mentioned deed interest at the increased rate was uniformly paid to the first mortgagees, sometimes by the mortgagor, and at other times by the receiver with his consent, no notice ever having been given to the receiver to pay interest to *M.*, or that his interest was in arrear. A foreclosure suit having been instituted by the first mortgagees, a decree was made directing the usual account of what was due on the first mortgage. The Chief Clerk certified the whole principal to be due, but the Vice-Chancellor directed him to review his certificate, and to charge the first mortgagees with everything they had received from the receiver in excess of £5 per cent.:—

Held, that this decision could not be maintained, for that whether the extra £1 per cent. was rightfully received, or not, it was neither paid nor received in respect of the principal moneys and interest secured by the first mortgage, and could not be attributed to it, nor taken into account in ascertaining what was due on the first mortgage, and that *M.*'s claim (if any) in respect of such extra payments must be enforced by some independent proceeding:

Held by *Rolt*, L.J., that *M.* had no such claim, for that the trust to pay *M.*'s interest out of the surplus rents did not attach unless and until the receiver had notice that such interest was in arrear.

LAW *v.* GLENN 634

RECEIVER—Railway company making default in payment of purchase-money 100

See DEFAULT.

RECITAL IN ACT, Effect of 760

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RECTIFICATION OF REGISTER—Jurisdiction under Companies Act, 1862, s. 35 431

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———————— Variance—Laches .. 412, 536, 674
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RESCINDING SALE, Condition for 102
See CONDITIONS OF SALE.

RESOLUTION, Foundation of extraordinary 191
See EXTRAORDINARY RESOLUTION.

RESOLUTION SUSPENDING BANKRUPTCY—*Jurisdiction of Commissioner—Bankruptcy Act*, 1861, *ss.* 110, 136.] The claim of a creditor in a bankruptcy was adjourned by the Commissioner. Before the further consideration of the claim a resolution was passed, under the 110th section of the *Bankruptcy Act*, 1861, that the proceedings in bankruptcy should be suspended, and the estate administered out of bankruptcy:—

Held, that the Commissioner, notwithstanding the resolution, had jurisdiction, under the 136th section of the *Bankruptcy Act*, 1861, to inquire into the disputed claim.

Ex parte WEBSTER. *In re* WICKHAM 556

RESTRAINT OF APPLICATION TO PARLIAMENT—*Jurisdiction—Company.*] A railway company agreed to purchase the land of a landowner, and had a clause to that effect inserted in their Act, whereupon he withdrew his opposition to the Act. They afterwards applied to Parliament for an Act to enable them to abandon the branch which affected the land in question, and to repeal that clause:—

Held, that the Court would not restrain the company from making the application.

The Court has power to restrain an application to Parliament, but it is difficult to conceive a case in which it will be done.

Decree of *Wood*, V.C., affirmed.

STEELE *v.* NORTH METROPOLITAN RAILWAY COMPANY 237

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REVERSION, Sale of, restrained 542
See SALE OF REVERSION.

REVERSIONARY INTEREST—Property subject to annuity 542
See SALE OF REVERSION.

REVIVOR FOR COSTS—*Practice—Abatement by Bankruptcy.*] The Plaintiff, in a suit in which nothing remained to be done but the taxation and payment to him by the Defendant of his costs, became bankrupt:—

Held, that a supplemental order to carry on proceedings might be made on the application of his assignees.

ELLISON *v.* SHARP 355

REVIVOR OF DEBT—When penalty 255
See AGREEMENT TO ACCEPT PART OF DEBT IN DISCHARGE OF THE WHOLE.

RIGHT OF SOLICITOR'S CLERK TO APPEAR—*Bankruptcy Act*, 1861, *s.* 212.] A Commissioner in bankruptcy is not bound to hear a person who, although a duly admitted solicitor of the Court, does not appear as the solicitor of the party for whom he appears, but only as the clerk of such solicitor.

Ex parte BROADHOUSE. *In re* BROADHOUSE 655

RIGHT TO USE TITLE OF BOOK—*Copyright—Trade Mark*—5 & 6 *Vict. c.* 45.] *H.*, in 1863, registered an intended new magazine, to be called "*Belgravia*." In 1866, such magazine not having appeared, *M.*, in ignorance of what *H.* had done, projected a magazine with the same name, and incurred considerable expense in preparing it, and extensively advertising it in August and September, as about to appear in October. *H.*, knowing of this, made hasty preparations for bringing out his own magazine before that of *M.* could appear, and in the meantime accepted an order from *M.* for advertising *M.'s* magazine on the covers of his own publications, and the first day on which he informed *M.* that he objected to his publishing a magazine under that name was the 25th of September, on which day the first number of *H.'s* magazine appeared. *M.'s* magazine appeared in October:—

Held, on bill filed by *M.* (affirming the decision of *Stuart*, V.C.), that *M.'s* advertisements and expenditure did not give him any exclusive right to the use of the name "*Belgravia*," and that he could not restrain *H.* from publishing a magazine under the same name, the first number of which appeared before *M.* had published his:

Held, on bill filed by *H.*, that *H.'s* registering the title of an intended publication could not give him a copyright in that name, and that, in the circumstances of the case, he had not acquired any right to restrain *M.* from using the name, as being *H.'s* trade mark.

MAXWELL *v.* HOGG. HOGG *v.* MAXWELL 307

RIPARIAN PROPRIETORS—*Fouling Water—Prescription—Additional Nuisance—Abandonment of Easement—Injury—Reservation of Rights.*] Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people.

The fact that the stream is fouled by others, is not a defence to a suit to restrain the fouling by one.

The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin:—

Held, that any right of fouling a stream attached to them was lost.

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The owner of land on the banks of a river can maintain a suit to restrain the fouling of the water of the river, without shewing that the fouling is actually injurious to him.

C., wishing to prevent the water of a river from being fouled by some dye-works, purchased from the owners of the dye-works a piece of land on the banks of the river, without communicating to them his object :—

Held, that in the absence of any express reservation by the owners of the dye-works of the right of fouling, *C.* could maintain a suit to restrain it.

Decree of *Wood*, V.C., affirmed with variations.

CROSSLEY AND SONS, LIMITED *v.* LIGHTOWLER 478

SALE to satisfy judgment against railway company 382, 385
See JUDGMENT CREDITOR. 1, 2.

———, Setting aside—Fiduciary relation 55
See SETTING ASIDE SALE.

SALE AT DISCRETION—Income, how ascertained 751
See CONVERSION.

SALE, CONDITIONS OF—Misrepresentation 102
See CONDITIONS OF SALE.

SALE OF BUSINESS of one company to another 405
See ASSETS.

SALE OF REVERSION—*Property subject to Annuity—Life Estate—Charges—Excessive Rate of Interest—Penalty.*] *W.* was entitled to the income of property subject to the payment of a life annuity to *C.*, and of the interest on mortgages, whereby the present income was reduced to a small amount. In consideration of the advance of £1000, *W.* assigned the income by way of security for the payment of £3300 on the death of *C.*, redeemable on payment of £1500 at the end of the first year. By a memorandum, *W.* further agreed to repay £400, and interest at 5 per cent. per month, which security was to be tacked to the former security :—

Held, that *W.*'s interest in the income was not a reversion, and that the transaction therefore could not be set aside as a sale at an undervalue :

Held, also, that the security for £400 and interest was valid.

Decree of the Master of the Rolls reversed.

WEBSTER *v.* COOK 542

SALE OF SHIP—Foreign mortgage 282
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SALE WITHOUT RESERVE—Puffing 21
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SCOTCH COURT—Jurisdiction on examination of witnesses in Scotland 571
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SCOTLAND, examination of witnesses in 571
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SEALING OF PATENT—*Objections*—15 & 16 *Vict. c.* 83, *s.* 10.] A person may give notice of objection, and oppose the sealing of a patent before the Lord Chancellor, without previously applying to the Court for leave to enter opposition.

The Lord Chancellor, on an application for sealing a patent, will not interfere with the decision of the law officer of the Crown, unless in case of fraud, or surprise, or of some material fact having come to the knowledge of the party since the case was before the law officer.

The sealing of a patent was opposed on the ground of previous public user of the invention, in reply to which the applicant made the case, that such user was obtained by fraud on him, so as to bring the case within 15 & 16 Vict. c. 83, s. 10:—

Held, that such a case ought to be tried before a jury, and that the patent ought to be sealed that such trial might not be precluded.

In re VINCENT'S PATENT 341

2. ——— *Objections*—15 & 16 *Vict. c.* 83, *ss.* 12, 13, 14.] A party who has not opposed the sealing of a patent before the law officer of the Crown under 15 & 16 Vict. c. 83, s. 12, will not be allowed to oppose before the Lord Chancellor.

In re MITCHELL'S PATENT. *In re* BROTHERTON'S PATENT .. 343

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See CREDITOR HOLDING SECURITY.

SEPARATE ESTATE of partner, Proof against 550
See PROOF BY FIRM.

SERVICE OUT OF THE JURISDICTION—*Practice*—*Consolidated Order X. r.* 7.] The 7th rule of the 10th of the Consolidated Orders empowering the Court to order the service of a copy of a bill on a Defendant "in any suit" out of the jurisdiction, is not confined to suits relating to land, stock, or shares in *England*, within 2 Will. 4, c. 33, and 4 & 5 Will. 4, c. 82.

Cookney v. *Anderson* (1 D. J. & S. 365); *Foley* v. *Maillardet* (Ibid. 389); and *Samuel* v. *Rogers* (Ibid. 396), overruled.

Order of *Stuart*, V.C., affirmed.

DRUMMOND *v.* DRUMMOND 32

SET-OFF *of Calls in Winding-up—Bankrupt Contributory—Companies Act*, 1862, *s.* 95—*Bankruptcy Act*, 1849, *s.* 171.] Where a shareholder in a limited company has executed a deed of assignment, which has been registered under the *Bankruptcy Act*, 1861, the trustees of that deed are entitled to set off a debt due to the shareholder from the company against a demand for calls made by the official liquidator of the company.

In re DUCKWORTH 578

——— of calls against goods 511, 527
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See SOLICITOR'S LIEN.

SETTING ASIDE AGREEMENT, Purchase for purpose of 164
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SETTING ASIDE SALE—*Fiduciary Relation—Concealment.*] *T.*, a young man aged twenty-three, entitled to a moiety of a freehold estate the entirety of which brought in about £440 a year, being pressed for payment of his college debts, amounting to about £1000, and being estranged from his father, wrote to his great uncle for advice and assistance as to payment of the debts. The uncle deputed the Defendant, his nephew, to see *T.* on the subject. The Defendant met *T.* by appointment, and at this interview *T.* refused to allow any attempt to compromise the debts, and said he would sell his moiety of the estate, upon which the Defendant offered him £7000 for it, payable by instalments. *T.* next day accepted the offer. Before an agreement had been signed, the Defendant obtained a valuation by a surveyor estimating the value of the mines under the entirety at £20,000. The sale was completed without this valuation having ever been communicated to *T.* *T.*'s heir filed a bill to impeach the sale:—

Held, affirming the decree of *Wood*, V.C., that the Defendant had stood in a fiduciary relation to *T.*, which made it his duty to communicate to *T.* all material information which he acquired affecting the value of the property, and that, as he had not communicated the valuation to *T.*, the transaction must be set aside.

TATE *v.* WILLIAMSON 55

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SIGNING MEMORANDUM—*Contributory—Allotment of Shares.*] *E.* signed the memorandum of association of a company as the holder of ten shares, and acted for a short time as a director of the company. Other directors were then appointed, and *E.* never afterwards had

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anything to do with the company. No shares were ever allotted to him, and his name was never on the register. All the shares in the company were allotted to other persons, but the allotment of some was not final, and they were not taken up.

Held, that *E.*'s name ought to have been on the register, and that he was a contributory in respect of ten shares.

Order of the Master of the Rolls affirmed.

In re London, Hamburgh, and Continental Exchange Bank. Evans's Case 427

SOLICITOR, Notice to, when it affects client 143
See Option of Purchase.

——— Taxation after payment 707
See Taxation after Payment.

SOLICITOR'S CLERK—Right to appear in bankruptcy 655
See Right of Solicitor's Clerk to appear.

SOLICITOR'S LIEN—*Set-off in Bankruptcy.*] An adjudication in bankruptcy obtained by *D.* against *C.* was set aside, and *D.* was ordered to pay *C.* his costs, for which, if not paid when taxed, *C.* was to be at liberty to issue execution. *D.* then executed an assignment to trustees for his creditors in the form of Schedule D. to the *Bankruptcy Act*, 1861. The costs were afterwards taxed. *C.*, at the date of the deed, owed *D.* a sum exceeding the amount of the taxed costs. If *C.*, who had not acceded to the deed, was reckoned as a creditor of *D.* for the amount of taxed costs, the deed was not assented to by the requisite majority of creditors. *C.*'s solicitor had not been paid his bill of costs in the bankruptcy proceedings, and claimed his lien on the costs payable by *D.*:—

Held, that *C.*'s solicitor was entitled to a lien on the costs ordered to be paid to *C.* by *D.*, and that therefore the debt due from *C.* to *D.* could not be set off against them:

Held, further, that *C.* ought to be allowed to issue execution for the costs, for that if he was, in respect of those costs, a creditor of *D.* within the meaning of the *Bankruptcy Act*, 1861, s. 192, the deed was not assented to by the majority requisite to bind non-assenting creditors; and if he was not such a creditor, the deed did not apply to his claim, so that in neither view could he be affected by the deed.

Ex parte Cleland. *In re* Davies 808

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See Payment of Purchase-money into Court.

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See Public Convenience.

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STANNARIES COURT—*Jurisdiction—Companies Act*, 1862, *s.* 35—*Rectification of Register.*] The jurisdiction conferred by the 35th section of the *Companies Act*, 1862, to rectify the register of companies within the district of the Stannaries, does not exclude the jurisdiction of the superior Courts of common law and equity for the same purpose.

Decision of *Stuart*, V.C., reversed.

Where a company has been established for working mines within the district of the Stannaries, the fact that some of the objects of the company are to be carried out beyond the district does not exempt the company from the jurisdiction of the Stannaries Court.

In re PENHALE AND LOMAX CONSOLIDATED SILVER LEAD MINING COMPANY 398

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STAY OF PROCEEDINGS—Foreign state Plaintiff—Cross bill 582
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STOPPAGE IN TRANSITU—*Jurisdiction—Equity—Purchaser's Ship.*] A bill in equity will lie to enforce a right of stoppage *in transitu*.

Goods were shipped by a vendor on board a ship belonging to the purchaser, but employed as a general trader. Four bills of lading were made, under which the goods were deliverable to the purchaser or assigns; three of the bills were kept by the vendor, and one by the master of the ship:—

Held, that the delivery on board the purchaser's ship was delivery to the purchaser so as to preclude stoppage *in transitu* before the delivery of the goods at the port of consignment.

Decree of the Master of the Rolls reversed.

SCHOTSMANS *v.* LANCASHIRE AND YORKSHIRE RAILWAY COMPANY 332

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SUBDIVISION OF SHARES *into Shares of less nominal Amount—Companies Act*, 1862, *ss.* 8, 12—*Contributory.*] The memorandum of association of a company provided that the capital should be £3,000,000, divided into 30,000 shares of £100 each, "subject to be increased or modified," and the articles gave the board of directors power to divide the shares into shares of smaller amount. The directors exercised this power and converted each £100 share into five £20 shares:—

Held, that such conversion was unauthorized and void; for that, under clause 12 of the *Companies Act*, the memorandum can only be altered in certain particulars, of which this was not one, and, *per* Lord *Cairns*, L.J., an express power in the memorandum to reduce the nominal amounts of the shares would be ineffectual.

After the attempted conversion, *F.* transferred to *R.* fifty of the new £20 shares. These shares could be identified in the books of the

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company as being the shares into which ten of the original £100 shares had been divided:—

Held, that the transfer was effectual to pass the ten £100 shares, and that *R.* and not *F.*, must be on the list of contributories.

K. at the time of the attempted conversion was a holder of £100 shares, the certificates of which he never exchanged. The directors, after the conversion, made a call on the £20 shares, and *K.* not paying it, they forfeited his shares in January, 1865, in a way which, if the conversion had been legal, would have been quite regular. *K.* wrote a letter asking a remission of the forfeiture, treating the shares as £20 shares, and making no objection to the regularity of the proceedings. No notice was taken of the letter, and he never afterwards claimed to be a member. In May, 1866, a winding-up order was made:—

Held, that the forfeiture must be treated as valid, and that *K.* was not a contributory.

In re Financial Corporation. Feiling's and Rimington's Case. King's Case. Holmes's, Pritchard's, and Adams's Cases 714

SUCCESSION OR LEGACY DUTY—Certificate 155
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SUSPENSION OR ABANDONMENT — Prescription — Fouling—Easement 478
See Riparian Proprietors.

TAKING BILL OFF THE FILE—*Practice—Improper Suit—Want of Interest in Plaintiff—Mala Fides.*] The Plaintiff having lost money by speculating in the shares of a joint stock company, purchased five shares, for the purpose of qualifying himself as a shareholder, and then filed a bill, on behalf of himself and the other shareholders, against the company and other persons, impeaching certain transactions between them, on the ground of fraud. The bill also impeached certain preliminary proceedings which had been taken for the purpose of winding up and re-constituting the company. After the bill was filed, the company was wound up and re-constituted. The Defendants put in answers which were excepted to for insufficiency, and, while the exceptions were pending, they moved to take the bill off the file, or to stay proceedings:—

Held (affirming the order of *Malins*, V.C.), first, that at that stage of the cause, the Defendants not having sufficiently denied the charges of fraud, the *mala fides* of the Plaintiff in filing the bill was no ground for taking the bill off the file:

Secondly, that the small interest of the Plaintiff was no objection to the bill, as it was filed on behalf of himself and other shareholders:

Thirdly, that as the bill impeached the preliminary proceedings in the winding up, the fact of the company having been wound up subsequently was no ground for staying the proceedings.

Seaton *v.* Grant 459

TAXATION AFTER PAYMENT—*Special Circumstances*—6 & 7 *Vict. c.* 73, *s.* 38—*Taxation by Party not chargeable—Costs.*] *W.*, on the 31st of May, 1865, agreed in writing to take a lease from *G. & T.*, and to pay their costs of the agreement and of the lease and counter-

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part, and incidental thereto. *W.* paid the bill of *G. & T.'s* solicitors, and afterwards applied for taxation against the solicitors. An order was made to tax the bill, "upon the terms of the agreement dated the 31st of May, 1865:"—

Held, on appeal, that this reference to the agreement was erroneous, for that the order must be to tax the bill which *W.* had paid, without anything to limit the bill to that which would be the proper bill as between *G. & T.* and *W.*

The circumstances which will induce the Court to order taxation after payment considered.

Costs of motion to tax and of appeal motion ordered to abide the result of the taxation.

In re NEWMAN 707

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THIRD PARTY CLAUSE—Form of taxation—Order 707
See TAXATION AFTER PAYMENT.

TIMBER—*Waste—Tenant for Life—Remainderman—Trustee—Statute of Limitations.*] The Court would not be justified in ordering timber to be cut on the application of a tenant for life impeachable for waste, merely because it was ripe for cutting, unless it were also decaying, or injuring the growth of other timber.

If a tenant for life impeachable for waste, cuts timber without the leave of the Court, he will never be permitted to derive any advantage from his wrongful act.

In such a case, the act being wrongful, the *Statute of Limitations* begins to run against the remainderman from the time of the cutting.

Where a debtor takes out administration to his creditor, the running of the statute will be suspended during the administration.

Decree of the Master of the Rolls affirmed with variations.

SEAGRAM *v.* KNIGHT 628

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TRADING—*Bankruptcy Act*, 1849, *s.* 65—*Slate Quarry—Dealing in Shares—Trading out of the District.*] The lessee of a quarry who digs rock, and works it up into slates for sale, is not thereby made a trader within the meaning of the bankrupt laws.

Nor is he so made a trader by selling tools and gunpowder to his workmen, nor by letting a builder have iron and timber to be used in buildings on the quarry.

Dealing in shares in joint stock companies is not trading under the bankrupt laws.

A trading out of any district will support an adjudication in the district.

In re CLELAND 466

——————— out of district—Quarries—Shares 466
See TRADING.

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TRADING UPON FICTITIOUS CAPITAL—*Debt without Expectation of being able to pay—Bankruptcy Act*, 1861, *s.* 159.] Where a trader raises money by discounting accommodation bills, but does not negotiate the bills in the course of his trade, this is not trading by means of fictitious capital within the meaning of the *Bankruptcy Act*, 1861, s. 159.

Overdrawing an account current at a banker's, by a person in insolvent circumstances, does not in itself amount to contracting a debt without reasonable or probable ground of expectation of being able to pay the same, within the same section.

Ex parte HARRISON. *In re* BAILLIE AND HARRISON 195

TRANSFER, *Delay in registering—Rectification of Register—Contributory—Companies Act*, 1862, *s.* 35.] *S.* executed a transfer of shares to *H.* in December, 1865. The transfer, according to the articles of association, required the sanction of the directors, who might refuse it in certain cases. The transfer was not left at the office for approval till the 3rd of March, 1866. In the ordinary course of business, the directors met once a week. Their last meeting had been on the 1st of March, and their next was to be on the 8th. On the 7th of March a Petition to wind up the company was presented, and on the 17th a winding-up order was made. The transfer had never been registered:—

Held, that there had been no default or unnecessary delay on the part of the company in placing *H.* on the register of shareholders; and an application by *S.*, to which *H.* consented, to have the register rectified, and the name of *H.* substituted for that of *S.* on the list of contributories, was refused. Order of the Master of the Rolls affirmed.

In re JOINT STOCK DISCOUNT COMPANY. SHEPHERD'S CASE .. 16

2. ———, *Non-registration of—Non-execution by Transferee—Companies Act*, 1862, *s.* 35—*Rectification of Register—Contributory.*] *I.*, a resident in *Smyrna*, who employed a company as his agents, directed them to buy shares in the company for him. On the 2nd of May they bought shares from *M.*, who executed a transfer to *I.* on the 4th, and left it at the company's office on the 7th. The next meeting of the directors was on the 10th; the company stopped payment on the 11th, and a winding-up Petition was presented on the 12th, on which an order was made. *I.* had signified to the company his approval of the purchase, but, being in *Smyrna*, had not executed the transfer, and it had not been registered. An order having been made for rectifying the register by removing the name of *M.*, it was proved on appeal, that although the articles of association did not prescribe any particular form of transfer, it had been the uniform practice of the company to have shares transferred by deed executed both by transferor and transferee:—

Held, that the directors were justified in not registering a transfer where the transfer deed had not been executed by the transferee; that there had therefore been no default or unnecessary delay by the company within the meaning of the *Companies Act*, 1862, s. 35; and that the name of *M.* could not be removed from the register.

In re IMPERIAL MERCANTILE CREDIT ASSOCIATION. MABINO'S CASE 596

TRANSFER—Subdivision of shares 714

See SUBDIVISION OF SHARES.

TRANSFER OF STOCK *to Trustees of Creditors' Deed—Order on Bank—Bankruptcy Act*, 1849, *ss.* 128, 141—*Bankruptcy Act*, 1861, *s.* 197.] A debtor executed a deed vesting all his property in trustees, to be applied for the benefit of his creditors, in like manner as if he had

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been adjudged bankrupt. The deed was duly registered. Shortly afterwards he died, leaving a sum of bank stock standing in his name, and there was no personal representative:—

Held, that, in the case of bankruptcy, the Court could have made an order under the Bankruptcy Act, 1849, s. 128, directing the bank to transfer the stock into the names of the assignees, without the bankrupt or his personal representative signing a transfer; that the *Bankruptcy Act*, 1861, s. 197, gave the trustees of such a deed as the present the same rights in this respect as if they had been assignees in bankruptcy; and that an order might be made upon the bank for transfer into the names of the trustees, upon which the bank could act without the concurrence of a personal representative.

Ex parte THE BANK OF ENGLAND. *In re* PRICE 662

TRANSFER TO ESCAPE LIABILITY—*Companies Act*, 1862, s. 35—*Rectification of Register—Jurisdiction of Court.*] In adjudicating on an application under sect. 35 of the *Companies Act*, 1862, a Court of equity is not bound to follow what a Court of law would do in such a case, but will take into consideration any principle of equity applicable to the subject.

The articles of a company provided that on proof of title and execution of transfer, the company should register the transferee, but that no transfer of shares should be made or registered after a call on such shares had been made until payment thereof. At a meeting of the board of directors the propriety of making a call was discussed. A shareholder present induced the directors to postpone consideration of the matter, and then, without informing them of his intention, transferred his shares to a pauper, in order to escape all further liability. The directors having declined to register the transfer:—

Held, that the Court would not, under sect. 35 of the *Companies Act*, 1862, rectify the register by removing the name of the transferor, and substituting that of the transferee.

Semble, in a case of doubt, the Court may, instead of adjudicating between a company and a person claiming to be registered as a shareholder under sect. 35 of the *Companies Act*, 1862, direct a suit to be instituted for the purpose of determining the rights of the parties.

In re NATIONAL AND PROVINCIAL MARINE INSURANCE COMPANY.
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TRANSFEREE, Non-execution by 596
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UNLIQUIDATED DAMAGES—*Creditors' Deed—Deed in form of Schedule D.—Bankruptcy Act*, 1861, *ss.* 153, 192, 197.] A person who has a claim against a debtor for unliquidated damages is not a

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creditor within the meaning of sects. 192 and 197 of the *Bankruptcy Act*, 1861.

Where a trust deed under the 192nd section does not in terms extend to creditors in respect of unliquidated damages, they cannot come in under the deed by virtue of the 153rd section. *Secus* as to a deed in the form of Schedule D. under the 200th section.

Ex parte WILMOT. *In re* THOMPSON 795

UNREASONABLENESS OF COMPOSITION—*Amount—Bankruptcy Act*, 1861, *s.* 192—*Composition Deed.*] A debtor, by deed, registered on the 2nd November, 1866, under sect. 192 of the *Bankruptcy Act*, 1861, covenanted to pay his creditors 2*s.* 6*d.* in the pound within two months from the registration; and the creditors released their debts, subject to a proviso for avoiding the deed on default in payment of the composition. Default was made, and on the 3rd of January, 1867, a similar deed was registered, with the assent of the requisite majority of creditors, by which the debtor covenanted for payment of 2*s.* 6*d.* in the pound within seven days after the expiration of four months. A non-assenting judgment creditor applied for leave to issue execution, on the ground that the deed was unreasonable, for that the composition, having regard to the state of the debtor's affairs, was unreasonably small, and that the second deed provided for payment only of the same composition as the first deed, after a longer time, and without any additional security. The Commissioner gave leave to issue execution:—

Held, that the deed was not *ex facie* void; the circumstance that it had been immediately preceded by the other deed being not decisive against its validity, but only a circumstance rendering strict investigation proper; and that the order for leave to issue execution ought to be discharged, and the case remitted to the Commissioner for further investigation.

Whether a registered deed can be treated as void against a non-assenting creditor for unreasonableness, because the amount of composition is too small—*quære*.

Ex parte ROOTS. *In re* ROOTS 559

2. ——————————— *Amount—Composition Deed—Bankruptcy Act*, 1861, *ss.* 192, 198—*Leave to issue Execution.*] The power given by the 192nd section of the *Bankruptcy Act*, 1862, enabling the majority of creditors assenting to a deed of arrangement to bind the non-assenting minority, is a statutory power, and must be exercised *bonâ fide* for the benefit of all the creditors. If, therefore, there is a fraudulent bargain for the benefit of some of the creditors, or if the majority of creditors are induced by friendly feelings towards the debtor to accept a composition greatly disproportioned to the assets, the Court will hold the deed not to be binding on a non-assenting creditor, and will give him leave to issue execution on his debt under the 198th section.

But if the assenting majority appear to have exercised their discretion *bonâ fide* for the benefit of the creditors, the Court will not sit in review on the *quantum* of the composition.

Ex parte COWEN. *In re* COWEN 563

VALUE, Mode of estimating, under covenant to settle 345
See COVENANT TO SETTLE.

VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM—*Companies Act*, 1862, *s.* 35—*Rectification of Register—Laches.*] *L.*, on the faith of a prospectus, applied, on the 4th of September, 1865, for shares in a company not yet registered. It was registered on the

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11th of September, 1865, under a memorandum differing materially from the prospectus. On the 7th of October, 1865, shares were allotted to *L.*, and on the 14th of October he paid upon them the sum payable on allotment. On the 14th of May, 1866, he was supplied with copies of the memorandum and articles, the contents of which he had not known until that time, and on the 16th he laid them before his solicitor, who advised him as to his position. On the 27th of September, 1866, he, for the first time, gave the company notice that he repudiated his shares :—

Held (affirming the decision of *Wood*, V.C.), that the delay which had taken place since the 16th of May, 1866, was sufficient to deprive *L.* of any right which he had on that day to repudiate his shares on the ground of the variance between the prospectus and memorandum.

Held, by Lord *Cairns*, L.J., that *L.* had not, on the 16th of May, 1866, any right of repudiation, for that, at the expiration of a reasonable time after the registration of the company, he must be held either to have acquainted himself with the memorandum and articles, or to have been content to waive any examination of them; and, *semble*, that such reasonable time had expired at the time when *L.* made the payment of the 14th of October, 1865.

K. applied for shares on the 18th of April, 1865, in a company which was registered on the 28th of April, under a memorandum differing from the prospectus. On the 29th of April shares were allotted to him, and on the 11th of May he paid the balance of the deposit. On the 25th of April, 1866, he also made a payment on account of a call in respect of the shares; at which time he alleged that he was ignorant of the contents of the memorandum of association. On the 17th of July he applied to have his name removed from the register :—

Held (reversing the decision of *Wood*, V.C.), that the delay which had taken place had deprived *K.* of his right to relief.

In re Cachar Company. Lawrence's Case. *In re* Russian (Vyksounsky) Iron Works Company. Kincaid's Case .. 412

2. VARIANCE BETWEEN PROSPECTUS AND MEMORANDUM—*Laches — Companies Act*, 1862, *s.* 35 — *Rectification of Register.*] Where there is a material variance between the prospectus of a company issued before registration, and the memorandum of association, a person who has applied for shares on the faith of the prospectus will have a reasonable time allowed within which to examine the memorandum, and repudiate the shares :—

But *Held* (affirming the decision of the Master of the Rolls), that where a shareholder had not examined the memorandum for more than eighteen months, and had taken no steps to repudiate the shares for some time after that, his name should not be taken off the list of contributories.

In re Madrid Bank. Wilkinson's Case 536

3. ——— *Laches — Rectification of Register—Companies Act*, 1862, *s.* 18—*Alteration in Memorandum after Signature—Effect of Certificate of Registration.*] The memorandum of association of a company when brought to the office of the Registrar of Joint Stock Companies for registration, was objected to by him as going beyond the prospectus, whereupon the bearer of it then and there, without any communication with the persons who had signed it, made alterations to remove the objections of the Registrar, who at once registered it in the altered form :—

Held, that although the conduct of the Registrar, in knowingly registering a document which had been thus altered, was most censurable, the company was duly constituted, the certificate of registration being,

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under sect. 18 of the *Companies Act*, 1862, conclusive evidence that the requisitions of the Act had been complied with :

Held, that a person who, before the registration of a company applies for shares on the faith of a prospectus, ought to be treated as having become aware of any variations between the prospectus and memorandum at the earliest practicable time.

Order of the Master of the Rolls affirmed.

In re BARNED'S BANKING COMPANY. PEEL'S CASE. 674

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Held, that the filing of the depositions was irregular, but the Court, on the ground of the Defendants' delay, refused to take the depositions off the file; but gave the Defendants leave to cross-examine.

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